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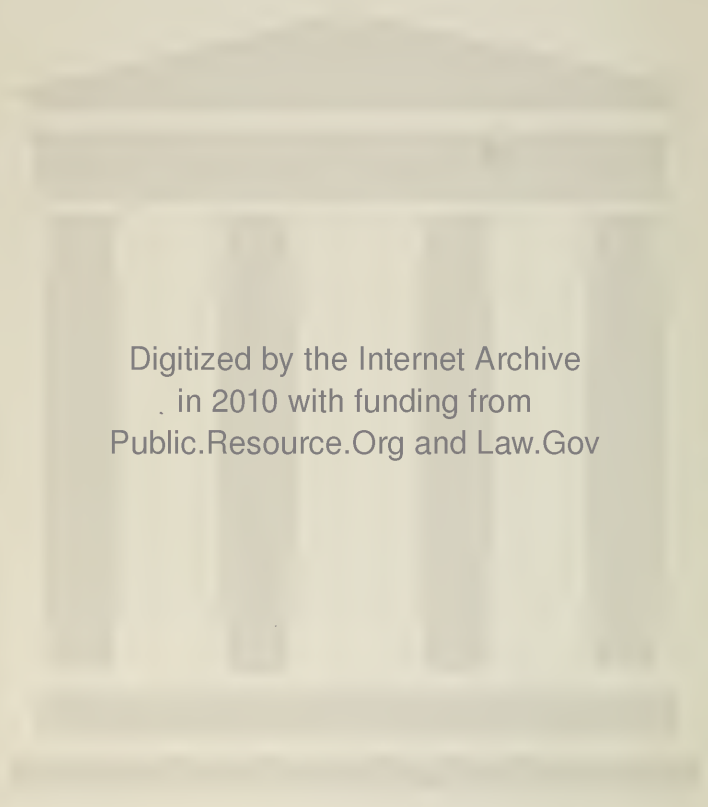
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2479
No. 11653

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY,
ANDREW M. ANDERSON, CHARLES L.
DAVIS, HARRY BEAL, ARTHUR DJERF,
EWALD K. ALBRECHT, HARRY L. TALLEY,
HARRY DAVIDSON, JOHN L. KIERSTEAD,
THOMAS W. HILL, LLOYD C. JACKSON,
ALFRED J. WITHERS, JOHN H. ZELL and
EDWARD DERHAM, on Behalf of Themselves
and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PIC-
TURE OPERATORS OF THE UNITED
STATES AND CANADA, et al.,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 9 1947

PAUL P. O'BRIEN,
CLERK

No. 11653

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Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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*Page number appearing at foot of Certified Transcript.

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 6063BH Civil

OSCAR SCHATTE, RAYMOND E. CONAWAY,
ANDREW M. ANDERSON, CHARLES L.
DAVIS, HARRY BEAL, ARTHUR DJERF,
EWALD K. ALBRECHT, HARRY L. TALLEY,
HARRY DAVIDSON, JOHN L. KIERSTEAD,
THOMAS W. HILL, LLOYD C. JACKSON,
ALFRED J. WITHERS, JOHN H. ZELL, and
EDWARD DERHAM, on Behalf of Themselves
and All Others Similarly Situated,

Plaintiffs,

vs.

ALLIANCE

THE INTERNATIONAL ~~ASSOCIATION~~ OF THE-
ATRICAL STAGE EMPLOYEES AND MOV-
ING PICTURE OPERATORS OF THE UNITED
STATES AND CANADA; UNITED BROTHER-
HOOD OF CARPENTERS AND JOINERS OF
AMERICA; CONFERENCE OF STUDIO
UNIONS; RICHARD F. WALSH; ROY M.
BREWER; WILLIAM L. HUTCHESON; HER-
BERT K. SORRELL; JAMES SKELTON;
LOEW'S, INCORPORATED, a corporation;
PARAMOUNT PICTURES, INC., a corporation;
WARNER BROTHERS PICTURES, INC., a cor-
poration; COLUMBIA PICTURES [2] CORPO-
RATION, a corporation; SAMUEL GOLDWYN
PRODUCTIONS, INC., a corporation; REPUBLIC
PRODUCTIONS, INC., a corporation; HAL E.
ROACH STUDIO, INC., a corporation; TECHNICAL

COLOR MOTION PICTURE CORPORATION, a corporation; TWENTIETH CENTURY FOX FILM CORPORATION, a corporation; R. K. O. RADIO PICTURES, INC., a corporation; UNIVERSAL PICTURES COMPANY, INC., a corporation; ASSOCIATION OF MOTION PICTURE PRODUCERS, INC., a corporation; JOHN DOE I; JOHN DOE II; JOHN DOE III; JOHN DOE IV; JOHN DOE V; JANE DOE I; JANE DOE II; JOHN DOE I COMPANY, a corporation; JOHN DOE II COMPANY, a corporation; JOHN DOE III COMPANY, a corporation; JOHN DOE IV COMPANY, a corporation; JOHN DOE V COMPANY, a corporation; JOHN DOE VI COMPANY, a corporation; JOHN DOE VII COMPANY, a corporation; JOHN DOE VIII COMPANY, a corporation; JOHN DOE IX COMPANY, a fictitious name; and JOHN DOE X COMPANY, a co-partnership; JOHN DOE I ASSOCIATION; JOHN DOE II ASSOCIATION,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF

The plaintiffs complain on behalf of themselves and all others similarly situated and for cause of action allege that:

I.

The plaintiffs herein are citizens of the United States residing within the Southern District of California and within the jurisdiction of this Court; said plaintiffs are members of defendant The United Brotherhood of Carpenters and Joiners of America, American Federation of Labor, Local Number 946.

II.

The questions of law and facts stated in this action, and the issues herein to be litigated and the relief sought are of common concern and interest to all members of the Carpenters Union heretofore or now employed as carpenters in the motion picture studios [3] located in the Southern District of California, and, on account of the controversy alleged hereinafter, to all persons employed in any capacity in the making of motion pictures and its dependent and affiliated industries, whether said persons are affiliated with an organized labor union or not; that such persons are so numerous, amounting to many thousands of individuals, as to make it impracticable to bring all of them before the Court as individual plaintiffs; and that, therefore, these plaintiffs sue for themselves and for the benefit of all other persons similarly situated.

III.

The defendant The International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, referred to hereinafter as "I.A.T.S.E.," is a labor union comprising local unions of persons residing in the Southern District of California and employed by the motion picture industry therein; defendant Richard F. Walsh is International President of defendant I.A.T.S.E. and at all time alleged herein acted as agent for the aforesaid local unions and within the time, scope, and purpose of said agency; defendant Roy M. Brewer is International Representative of defendant I.A.T.S.E. and said Brewer, John Doe I, John Doe II, John Doe III, John Doe IV, and Jane Doe I at all times alleged herein acted as agents for the aforesaid union and within the time, scope, and purpose of said agency.

IV.

The defendant The United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as "Carpenters Union," is a labor union comprising local unions of persons residing in the Southern District of California and engaged in performing work for the motion picture industry therein; defendant William L. Hutcheson is National President of defendant Carpenters Union and at all times alleged herein acted as agent for the aforesaid local unions and within the time, scope, and purpose of said agency; defendant James Skelton is Business Agent for Local 946 of Carpenters Union, and at all times alleged herein acted as agent of said local union and within the time, scope, and purpose of said agency.

V.

The defendant Conference of Studio Unions is an organization of local unions of various crafts comprising members employed by the motion picture industry in [4] the Southern District of California, including the aforesaid Local 946 of Carpenters Union; defendant Herbert K. Sorrell is President of defendant Conference of Studio Unions, and at all times alleged herein acted as agent of Carpenters Union and within the time, scope, and purpose of said agency.

VI.

The defendants Loew's, Incorporated, a corporation; Paramount Pictures, Inc., a corporation; Warner Brothers Pictures, Inc., a corporation; Columbia Pictures Corporation, a corporation; Samuel Goldwyn Productions, Inc., a corporation; Republic Productions, Inc., a corporation; Hal E. Roach Studio, Inc., a corporation; Technicolor Motion Picture Corporation, a corporation,

Twentieth Century Fox Film Corporation, a corporation; R. K. O. Radio Pictures, Inc., a corporation, and Universal Pictures Company, Inc., a corporation, John Doe I Company, John Doe II Company; John Doe III Company, John Doe IV Company, John Doe V Company, John Doe VI Company, John Doe VII Company, John Doe VIII Company, John Doe IX Company, a fictitious name, and John Doe X Company, a co-partnership, John Doe V, and Jane Doe II, hereinafter referred to as "Motion Picture Companies," are engaged in the business of making motion pictures with studios, offices, and places of business located within the Southern District of California and within the jurisdiction of this Court.

The defendant Association of Motion Picture Producers, Inc., hereinafter referred to as "Producers Association," is a corporation created and maintained by the other defendants named in this paragraph, and said defendant, John Doe I Association, and John Doe II Association at all times alleged herein were the agents of defendant Motion Picture Companies and acting within the time, scope, and purpose of said agency.

VII.

The true names of the defendants, John Doe I; John Doe II; John Doe III; John Doe IV; John Doe V; Jane Doe I; Jane Doe II; John Doe I Company, a corporation; John Doe II Company, a corporation; John Doe III Company, a corporation; John Doe IV Company, a corporation; John Doe V Company, a corporation; John Doe VI Company, a corporation; John Doe VII Company, a corporation; John Doe VIII Company, a corporation; John [5] Doe IX Company, a fictitious name; and Jane Doe X Company, a co-partnership; John Doe I Association,

and John Doe II Association, are unknown to plaintiffs, and when the same shall become known, plaintiffs will pray leave to amend this complaint to insert said true names.

VIII.

Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code Annotated; Sections 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV.

IX.

The matter in controversy herein, being the right to work for wages, exceeds the value of Three Thousand Dollars (\$3,000.00), exclusive of costs and interest, as to each plaintiff herein, and arises under the Constitution and laws of the United States.

X.

The acts and conduct of defendants alleged herein has subjected and continues to subject plaintiffs to deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States and with the object of injuring plaintiffs in their persons and property in having and exercising said rights and privileges as citizens of the United States.

XI.

The defendant Carpenters Union is, under the provisions of the National Labor Relations Act, the legally constituted bargaining agency of carpenters employed by

defendant Motion Picture Companies, and is so recognized by said defendant companies and Producers Association and by defendants I.A.T.S.E., Walsh, and Brewer.

The defendant I.A.T.S.E. is, under the provisions of the National Labor Relations Act, the legally constituted bargaining agency of stagehands employed by defendant Motion Picture Companies, and is so recognized by said defendant companies and Producers Association and by defendants Carpenters Union, Conference of Studio Unions, Hutcheson, Skelton, and Sorrell;

Both said defendant unions are affiliated with and subdivisions of the parent union organization, the American Federation of Labor. [6]

XII.

The controversy alleged herein involves the allocation of labor to be performed for defendant Motion Picture Companies by members of respective defendant unions under the terms and provisions of contracts entered into and executed by and with said company defendants and defendant Producers Association, and under agreements and decisions, findings and awards heretofore arrived at in pursuance to arbitration agreements made and entered into by all defendants herein.

The controversy alleged herein is not a "labor dispute" over conflicting claims to bargaining rights or any other such issue within the scope of the National Labor Relations Act, defendant unions being recognized by all defendants herein as the legally constituted collective bargaining representatives of their respective members; and the Board created by said Act has no jurisdiction either to interpret and adjudicate the terms of said contracts, findings, decisions, and arbitration awards or to hold

hearings and render judgment on the type, class, and nature of services to be rendered by members of respective defendant unions.

Said contracts, decisions, findings, and awards in arbitration involve rights and privileges secured to plaintiffs by the Constitution and laws of the United States.

XIII.

Since the beginning of the making of motion pictures in the Southern District of California, and until events related hereinafter, plaintiffs and the class for which they sue have been employed by defendant Motion Picture Companies under the terms of succeeding contracts for the performance of any and all carpenter work in connection with the making of motion pictures, including the construction of all sets and stages, platforms, buildings, and parts of buildings, the operation of all wood working machinery and tools, the making of all furniture and wood fixtures, the performing of all trim and mill work, the erection, modeling and remodeling, destruction and dismantling of all scaffolds, platforms, frames, buildings and streets, and the performance of all labor involving the use of carpenter tools.

XIV.

A basic agreement between defendant Motion Picture Companies and defendant Carpenters Union covering rates of pay, tenure, seniority, vacations, and other terms and conditions of employment and giving members of said Carpenters Union the exclusive [7] right to do any and all carpenter work for said companies was agreed to and executed on or about November 29, 1926, and has been continued in effect by the parties with periodic adjust-

ments, supplements, and amendments up to the present time;

The current contract between said defendants, referred to as the Beverly Hills Interim Agreement of July 2, 1946, is attached here to as Exhibit "A" and incorporated herein by reference.

XV.

Beginning in 1921 and continuing until the present time, representatives of defendant Carpenters Union and representatives of defendant I.A.T.S.E. have engaged in a series of negotiations between themselves and with defendant Motion Picture Companies, and have entered into arbitration before other representatives of the American Federation of Labor, with the view of settling existing disputes and controversies over the relative services to be rendered to defendant Motion Picture Companies by members of said respective unions; said negotiations and arbitrations have resulted in a series of agreements, decisions, and awards constituting a fair and practical division of motion picture employment between the members of said unions, as is set forth in detail hereinafter.

XVI.

The first such agreement and award, known as the American Federation of Labor Jurisdictional Award, was agreed to and executed on July 9, 1921, by representatives of the aforesaid defendant unions and of the American Federation of Labor; said agreement and award prescribed the work to be done by members of the Carpenters Union as, among other things, "Any and all carpenter work in connection with the moving picture studios . . ."

The full text of said agreement and award is attached hereto as Exhibit "B" and incorporated herein by reference.

XVII.

On February 5, 1925, representatives of the local unions of I.A.T.S.E. and of the Carpenters Union reached a further agreement as to the division of employment between them, as follows:

Division of work, by the United Brotherhood of Carpenters and Joiners:

- Section 1. All trim and mill work on sets and stages.
- Section 2. All mill work and carpenter work in connection with studios.
- Section 3. All work in carpenter shops. [8]
- Section 4. All permanent construction.
- Section 5. All construction work on exterior sets.

Division of work, by the International Alliance of Theatrical Stage Employees:

- Section 6. Miniature sets.
- Section 7. Property building.
- Section 8. Erection of sets on stages except as provided in Section 1.
- Section 9. Wrecking all sets, exterior and interior.
- Section 10. Erecting platforms for lamp operators and camera men on stages.

The full text of said agreement is attached hereto as Exhibit "B" and incorporated herein by reference.

XVIII.

In March, 1936, defendant William L. Hutcheson, President of defendant Carpenters Union, and George Brown, President of defendant I.A.T.S.E., ratified the aforesaid agreement of February 5, 1925, as the basis for settlement of controversies between the respective unions over the allocation of work to be performed by members thereof for defendant Motion Picture Companies.

XIX.

Meeting at Cincinnati from October 15 to 25, 1945, with the Executive Council of the American Federation of Labor, representatives and agents of defendant Motion Picture Companies, defendant Producers Association, defendant I.A.T.S.E. and defendant Carpenters Union reached an agreement, hereinafter referred to as the Cincinnati Agreement, and in pursuance to said agreement between said parties, the Executive Council of the A. F. of L. issued the following directive:

“Hollywood Studio Union Strike and Jurisdiction Controversy:

1. The Council directs that the Hollywood strike be terminated immediately.
2. That all employees return to work immediately.
3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.
4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.

5. That all parties concerned, the International Alliance of Theatrical Stage [9] Employees and Moving Picture Machine Operators of the United States and Canada, the United Brotherhood of Carpenters and Joiners of America, the International Association of Machinists, the United Association of Plumbers and Steam Fitters of the United States and Canada, the Brotherhood of Painters, Decorators and Paperhangers of America, the International Brotherhood of Electrical Workers of America, and the Building Service Employees' International Union, accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render."

XX.

In compliance with those provisions of the aforesaid directive "that the Hollywood strike be terminated immediately" and "that all employees return to work immediately," and at the aforesaid time and place, it was agreed between defendants Motion Picture Companies and Producers Association and defendant Carpenters Union that, pending the execution of arbitration procedure under said Cincinnati Agreement, plaintiffs would return to work for and be reemployed by defendant companies under the rates of pay, terms, and conditions of the last contract in existence between them, and that members and permittees of I.A.T.S.E. theretofore employed to do the work of plaintiffs would be withdrawn.

In pursuance to said agreement, plaintiffs returned to work for defendant Motion Picture Companies on or about November 1, 1945.

XXI.

In further compliance with the Cincinnati Agreement, negotiations were entered into between representatives of the Carpenters Union and representatives of the I.A.T. S.E., said negotiations resulting in a contract between said parties on November 13, 1945, providing in part, that Carpenters Union should have jurisdiction over "1. All temporary and permanent building construction work and the maintenance of same," and "3. the complete building, erection, re-erection and remodeling of all sets, streets, parts of sets and retakes, including sufficient platforms for shooting same . . ."

Full text of said agreement is attached hereto as Exhibit "C" and incorporated herein by reference.

Said contract was signed by representatives of the local unions under the authority and in the presence of defendants Walsh and Brewer representing defendant I.A.T. S.E. and defendant Skelton representing defendant Carpenters Union. [10]

XXII.

In pursuance to the aforesaid Cincinnati Agreement, the Executive Council of the American Federation of Labor appointed an Executive Committee comprising disinterested executives of said Federation, namely, Felix H. Knight, Chairman; W. C. Birthright, and W. C. Doherty.

XXIII.

On December 26, 1945, said Executive Committee made its Decision, Findings, and Award, the parts relating to parties hereto providing as follows:

"United Brotherhood of Carpenters and Joiners of America:

The Committee rules that the division of work agreement entered into between the United Brotherhood of Carpenters and Joiners of America and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada on February 5, 1925, and known as the "1926 Agreement" (set forth in full as Exhibit "B" attached hereto) be placed in full force and effect immediately.

Division of Work by the United Brotherhood of Carpenters and Joiners of America:

- Section 1. All trim and mill work on sets and stages.
- Section 2. All mill work and carpenter work in connection with studios.
- Section 3. All work in carpenter shops.
- Section 4. All permanent construction.
- Section 5. All construction work in exterior sets.

Division of Work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

- Section 6. Miniature Sets.
- Section 7. Property building.
- Section 8. Erection of sets on stage except as provided in Section 1.
- Section 9. Wrecking all sets, exterior and interior.
- Section 10. Erecting platforms for lamp operators and camera men on stages."

The full text of the Decision, Findings and Award of said Executive Committee is attached hereto as Exhibit "D" and incorporated herein by reference. [11]

XXIV.

With the design and purpose of violating and defeating the terms and purpose of the aforesaid Cincinnati Agreement and the Decision and Award of the Executive Committee in pursuance thereto, and in violation of the aforesaid agreement of November 13, 1945, and the earlier agreements on the subject herein alleged, defendants I.A.T.S.E., Walsh, and Brewer created and chartered a local union of said defendant I.A.T.S.E., designating it Set Erectors Local No. 468, and claimed for said local the right to perform "set construction," meaning and intending to include in said term the right for members of said newly created local to render each and all of those services allocated to plaintiffs under the award of said Executive Committee and under aforesaid agreements.

That the pretext of the right to do "set construction" work is based on language in the aforesaid award of December 26, 1945, that "erection of sets on stages" was within the division of work awarded to defendant I.A.T.S.E.

XXV.

Thereafter, and within the month of January, 1946, defendant Motion Picture Companies wrongfully and without just cause discharged approximately five hundred members of Carpenters Union from their employ, and to replace them and to do the work allocated to them as aforesaid, said companies employed members of the aforesaid Set Erectors Local No. 468 of defendant I.A.T.S.E.

and other persons not members of I.A.T.S.E. but issued "Permits to Work" and "Emergency Working Cards" by defendant officers and agents of said union, in violation of their obligations under the agreements hereinbefore alleged.

XXVI.

Thereafter and continuing to the present time, defendants Motion Picture Companies have refused to employ plaintiffs and the class for which they sue at the work prescribed by the aforesaid decision and award, but in said time have discharged approximately twelve hundred carpenters from said employment and have engaged members of defendant I.A.T.S.E. and persons not members thereof but issued "Permit to Work" and "Emergency Working Cards" by defendant officers of said union to do the work awarded by the aforesaid decision to plaintiffs, in violation of the agreements of said companies hereinbefore alleged.

A copy of an "Emergency Working Card" issued by officers and agents of defendant [12] I.A.T.S.E. but not entitling the recipient to membership or a voice in the affairs of defendant I.A.T.S.E., and revocable at will by defendant officers thereof, is attached hereto as Exhibit "E" and incorporated herein by reference.

XXVII.

Taking cognizance of the controversy over the meaning of the words "erection of sets" in the Decision, Findings, and Award of December 26, 1945, the Executive Council of the American Federation of Labor instructed the aforesaid Executive Committee to review its findings, after which said committee issued a further directive,

referred to as a "clarification," on August 16, 1946, in part as follows:

"Jurisdiction over the erection of sets on stages was awarded to the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada under the provisions set forth in Section 8 of the decision which specifically excluded trim and mill work on said sets and stages. The word erection is construed to mean assemblage of such sets on stages or locations. It is to be clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction.

"Sections 2 to 5 inclusive recognized the rightful jurisdiction of the United Brotherhood of Carpenters and Joiners of America on all mill work and carpenter work in connection with studios, all work in carpenter shops, all permanent construction and all construction work on exterior sets."

The full text of said directive is attached hereto as Exhibit "F" and incorporated herein by reference.

XXVIII.

On September 21, 1946, William L. Green, President of the American Federation of Labor, directed a letter to the Los Angeles Central Labor Council relating to the aforesaid Decision and Award of December 26, 1945, and the "clarification" thereof, in part as follows:

"Be assured that we will do everything that lies within our power to bring about the acceptance of the decision made by the committee representing the

Executive Council, and of its clarification of its decision, both in spirit and in letter. [13] All parties involved in the jurisdictional disputes agreed in advance of the decision of the committee to accept it and abide by it."

Full text of said letter is attached hereto as Exhibit "G" and incorporated herein by reference.

XXIX.

The contract of July 2, 1946, and the basic contracts which it supplements, as to rates of pay and terms and conditions of employment of plaintiffs by defendant Motion Picture Companies, and the agreements, decisions, findings, and awards in arbitration arrived at and agreed to by all defendants herein, specifying and allocating the type, class, and nature of work to be performed and rendered respectively by plaintiffs and by members of defendant I.A.T.S.E. are now in full force and effect and binding on all defendants herein.

XXX.

The plaintiffs stand ready, willing, and able to perform the work awarded to them as aforesaid, and at the rates of pay, terms, and conditions of their aforesaid contract with defendants Motion Picture Companies and Producers Association.

XXXI.

Defendants herein and each of them, acting individually and in concert with each other, have failed and refused and now fail and refuse to abide by and to perform on their parts the said contracts and decisions, findings and awards in arbitration, but said defendants have followed

and continue to follow a course of conduct and action in violation thereof as hereinbefore alleged.

XXXII.

The controversy alleged herein arises from the acts and conduct of defendants I.A.T.S.E., Walsh, and Brewer in claiming, demanding, and enforcing, by coercion and other devices, including the threat to close every motion picture theatre on the continent by calling out on strike all moving picture projectionists belonging to said union, their claim to the right to provide members of I.A.T.S.E. and non-union "permittees" of said union to do the work allocated to plaintiffs by the aforesaid Decision and Award and the clarification thereof, by historical custom and usage, and by the terms and provisions of agreements alleged hereinbefore, and the accession to said demands and the employment of members and "permittees" of I.A.T.S.E. to do the work of plaintiffs by defendant Motion Picture Companies. [14]

The claims of defendant I.A.T.S.E. and its officers and agents as aforesaid, and accession thereto by defendants Motion Picture Companies and Producers Association, have been and are controverted and resisted by defendants Carpenters Union, Conference of Studio Unions, Hutcheson, Skelton, and Sorrell.

XXXIII.

Said controversy involves the construction and interpretation of the terms and provisions of the contracts, agreements, decisions, findings and awards alleged herein, and the rights, privileges, and immunities of plaintiffs thereunder and under the Constitution and laws of the United States;

XXXIV.

The controversy is actual and involves more than the rights of these plaintiffs and of the thousands of persons of the class for whom they sue but involves the rights of each and every party hereto; and, in addition to said individual rights, this controversy gravely and seriously involves the public interest;

The declaratory relief sought herein is the only remedy available to plaintiffs to maintain:

1. The Constitutional and legal right of these plaintiffs, and of their class, and all others involved directly or indirectly, to work at their chosen vocations;

2. The Constitutional and statutory right of plaintiffs to perform and of all other parties hereto to have performed that labor prescribed under the contracts, decisions, findings and awards alleged herein;

3. The continued and uninterrupted production of motion pictures in said studios under the good faith observance of said contracts and arbitration determination;

4. The continued and uninterrupted flow of interstate commerce in the motion picture industry under the good faith observance of said contracts and arbitration determination; and

5. The maintenance of law and order in the City of Los Angeles and neighboring cities, in the County of Los Angeles, in the State of California, and in other states, under the observance of said contracts and arbitration determination, so as to bring an end to the state of emergency that has been declared by the public officials of the State of California and its subdivisions; [15]

XXXV.

That a state of emergency exists;

That this emergency is due to this controversy over rights secured by and flowing from the laws and Constitution of the United States, for which rights no relief or remedy is provided by law or equity except the order and judgment of this Court as Prayed;

That a Declaratory Judgment of these rights by this Court would bind all parties hereto and terminate the controversy and its attendant violence, chaos, and disorder.

For a Second and Separate Cause of Action, Plaintiffs Allege:

I.

Refer to Paragraphs I to XXXV, inclusive, of the First Cause of Action herein and incorporate herein each and every allegation of said Paragraphs as if realleged in full herein.

II.

Commencing on or about November 1, 1944, when Carpenters Union undertook to open negotiations to replace a contract with defendant Motion Picture Companies expiring on December 31, 1944, and continuing until the present time, defendants Walsh, Brewer, I.A.T. S. E., John Doe I, II, III, IV and V, Jane Doe I, Jane Doe II, and defendants Motion Picture Companies, Producers Association, John Doe I Association, and John Doe II Association, conspired each with the other, and continue to so conspire, to deprive plaintiffs of having and exercising, and to injure plaintiffs in their persons and property in the exercise of, rights, privileges and

immunities secured to plaintiffs by the Constitution and laws of the United States, in that said defendants conspired and continue to conspire each with the other to deprive plaintiffs of the right and privilege to work at their chosen vocations, to-wit: studio carpenters, and to interfere with, obstruct, impede, and hinder said plaintiffs in the free and unhampered exercise of said right and privilege; that said conspiracy has resulted and continues to result in great damages to plaintiffs in the loss of wages.

III.

In furtherance of said conspiracy, on April 10, 1945, defendants Walsh and I.A.T.S.E. chartered a local union of I.A.T.S.E., designating it Carpenters Local No. 787, for the [16] purpose of providing strikebreakers through said charter to impede, interfere with, obstruct, hinder and defeat plaintiffs in the free exercise of the aforesaid rights and privileges, injuring plaintiffs in their persons and property and depriving plaintiffs of having and exercising their rights and privileges as citizens of the United States.

IV.

In furtherance of said conspiracy, and with the object of injuring plaintiffs in their persons and property and depriving plaintiffs of having and exercising their rights and privileges as citizens of the United States, on April 14, 1945, defendant Walsh directed a letter to members of the Carpenters Union, and other unions, in part as follows:

“First of all, I want you to know that the International Alliance has reached an agreement with the Producers Association by which the I.A.T.S.E. will

supply all labor to the studios, not only in our crafts which were recognized before the strike, but also in those classifications which have been vacated by the striking unions. The I. A. assumed this responsibility only after we were certain that it was impossible to reach an honorable settlement with those persons who are conducting this strike against the I.A.T.S.E.

“On Tuesday night of this week a Carpenter’s Local was chartered and is now known as Local No. 787 of the I.A.T.S.E. On Thursday night, the Motion Picture Studio Painters, Local No. 788 of the I.A.T.S.E. was chartered. In addition to these Locals, there will be a local charter for Machinists, and if necessary for other crafts. We are proceeding in accordance with our agreement with the Producers to man the studios.

“As the International President of the I.A.T.S.E., I assure you that having assumed this jurisdiction, we will stake the entire strength of the International Alliance on our efforts to retain it.”

The full text of said letter is attached hereto as Exhibit “H” and incorporated herein by reference.

V.

In furtherance of said conspiracy, and by “agreement with the Producers Association,” and “proceeding in accordance with our agreement with the Producers to man the studios,” as stated in the afore-said letter of April 14, 1945, and with the object of injuring plaintiffs [17] in their persons and property and depriving plaintiffs of having and exercising their rights and privileges as citizens of the United States,

defendants Walsh, Brewer and I.A.T.S.E. did from March 12, 1945, and until on or about November 1, 1945, provide strikebreakers to defendant Motion Picture Companies, and said companies did wrongfully and without cause discharge members of Carpenters Union from their employment and did employ said strikebreakers to do carpenter work in the place of members of said Carpenters Union so discharged.

VI.

In furtherance of said conspiracy, defendants Walsh and I.A.T.S.E. did on or about November 1, 1945, create and charter Set Erectors Local No. 468 of defendant I.A.T.S.E. and did issue "Emergency Working Cards" and "Permits to Work" to persons not members of said union to perform carpenter services for defendant Motion Picture Companies (see Exhibit "E") and said companies did discharge numerous members of Carpenters Union and did employ for said carpenter work persons so supplied to them by said Local No. 468 of defendant I.A.T.S.E.; that to date approximately twelve hundred of said Carpenters Union have been so discharged.

VII.

In furtherance of said conspiracy, defendant Walsh on August 31, 1946 directed a letter to defendant Producers Association, saying in part:

"It is the contention of this International Union that this so called 'clarification' was issued without authority and in violation of the Cincinnati Agreement to which this International Alliance, yourselves, and the other International Unions involved,

were all parties. The Cincinnati Agreement in making provision for the creation of the three man committee, specifically provided that the parties there-to accept the Committee's decision as final and binding."

The full text of said letter is attached hereto and incorporated herein by reference as Exhibit "I."

VIII.

In furtherance of said conspiracy, defendant Walsh on September 13, 1946, directed a letter to local unions of defendant I.A.T.S.E., in part as follows:

"That no other organization shall be permitted, directly or indirectly to infringe upon the jurisdiction of the I.A.T.S.E. or its Local Unions in the Holly- [18] wood Studios; and that the employment of the members thereof shall not be interfered with or adversely affected."

The full text of said letter is attached hereto and incorporated herein by reference as Exhibit "J."

Wherefore, plaintiffs pray judgment of this Court declaring their rights as follows:

I. That plaintiffs have the right and privilege as citizens of the United States to work at their chosen vocations free from deprivation or injury by defendants and each of them, acting individually or in conspiracy with each other, or by and through their agents or officers;

II. That the Decision, Findings and Award of the Executive Committee of the American Federa-

tion of Labor of December 26, 1945, as clarified on August 16, 1946, is binding on all defendants herein;

III. That plaintiffs have the right, free from deprivation or injury by defendants, and each of them, acting individually or in conspiracy with each other, or by and through agents or officers, to perform that work specified in the American Federation of Labor Decision, Findings, and Award of December 26, 1945, as clarified by the directive of August 16, 1946;

IV. That the term "erection of sets on stages" as used in said award does not include any "set construction" but means "assemblage of such sets on stages" as stated in the directive of August 16, 1946;

V. That plaintiffs have the right to do any and all carpenter work in connection with the studios;

VI. That the agreement of July 2, 1946, is binding on the defendants party thereto.

VII. That plaintiffs have the right to work for defendant Motion Picture Companies under the rates of pay, terms, and conditions of the agreement of July 2, 1946, free from deprivation or injury by defendants and each of them, acting individually or in conspiracy with each other, or by their agents or officers.

And such further relief as the Court deems proper.

ZACH LAMAR COBB

BATES BOOTH

Attorneys for Plaintiffs [19]

EXHIBIT "A"

PRODUCERS COMMITTEE

Pat Casey, Chairman

July 2, 1946

Mr. Herbert K. Sorrell,
President, Conference of Studio Unions,
4157 West Fifth Street
Los Angeles 5, California

My Dear Herb:

Pending the completion of contracts between the individual unions, members of the C.S.U., and the major studios, these Minutes (copy attached herewith) shall constitute an Interim Agreement.

Sincerely yours,

(signed) Pat Casey,
Pat Casey, Chairman
Producers Committee

Enclosure

PC/h

Minutes of Meeting of Producers Labor Committee and Attorneys and Representatives of the C.S.U., Central Labor Council, I.A.T.S.E., Basic Group, and Plumbers, Held in Beverly Hills on Tuesday, July 2, 1946, at 2:45 P. M., Covering Agreements Reached and Effective Pending the Formal Signing of Contracts.

C.S.U. is representing:

Painters	Janitors
Carpenters	Analysts
Machinists	Publicists
Electricians	Officers & Guards
Plumbers	Set Designers (#1421)
Sheetmetal Workers	Cartoonists

All of the above to get a 25% increase on base and negotiate some inequities in a few crafts. [20]

All retroactive payments from expiration of previous contracts, most of which are January 1, 1946, except for new conditions such as night premiums at 6 p. m. etc., will become effective on July 15, 1946. Retro payments to be made within 30 days if possible. An interim agreement will be entered into pending drawing up formal agreements.

The 25% increases are on minimum wage scales and not on any overscale.

This deal is predicated on the recently concluded deal with the Independents and not on any new or changed deals which might be made later with them.

Arbitration:

C.S.U. as a body consisting of several locals will pledge itself to an arbitration procedure. If any of its members who subscribe to this plan fails to accept and to be guided by any arbitration award, he will not receive the support of the C.S.U. in its position.

This applies to Studio jurisdiction only and between locals.

Local #946 agrees to bind itself to the C. S. U. arbitration agreement and will find out if it can secure permission from its international to sign such an agreement as a local. All contracts will contain this arbitration clause—verbatim in each contract.

Any dispute other than wages should be submitted to arbitration. Skelton and Brewer will get together and make an agreement covering arbitration. Basis of arbitration will be the A.F.L. three man directive.

Any machinery set up for arbitration will not require the Electricians to withdraw their court action already started.

It was agreed to let each Studio interpret the directive and award the work where in its judgment it belongs under the directive and no work stoppage will be ordered for next 30 days or until the arbitration machinery is set up.

Plant Protection:

Camp's dispute with Helm is a private matter. Not to be discussed here.

Analysts:

Get an increase of 25% on the base rate during the interim period starting July 15, 1946. Understood there will be some adjustment of inequities, negotiations during next thirty days.

Machinists:

Both sides agree to let Machinists enjoy the 25% increase pending the N.L.R.B. decision. We are free to engage Machinists as individuals—not through either union, until the N.L.R.B. decision is made. [21]

Publicists:

Both sides agree to let the Publicists enjoy the 25% increase pending the N.L.R.B. decision. Inequities to be presented in the 30 day period.

Officers & Guards:

Independent contract provides for \$1.25 per hour for 12 months, escalating to \$1.50 after 12 months. Night rates to be as negotiated with Producers.

Janitors:

No rates were established for the Independents on certain classifications now in the Majors' contracts, such as Window Washers, Floor Waxers, etc. These will be adjusted relatively.

Cartoonists:

We will negotiate with Cartoonists with a 25% floor and inequities will be negotiated.

Set Designers:

Chadwick agreed not to hire anyone below the rates now being paid. Majors agree to an increase of 25% on current contract rates and to negotiate any inequities in the next 30 days.

Work Week:

36 cumulative hour week, 1½ after 6 hours, minimum call 6 hours, first week of employment. Applies only to off production employees. If we find this a hardship we can come back and see if we can solve the matter in some other way.

Contract for two years. If living costs go up 5% or more between July 1st and December 31st, 1946, unions may demand renegotiation of wages only.

Bureau of Labor Statistics for local area to be the authority.

All crafts going back to work Wednesday a. m. July 3, 1946, without discrimination.

(signed) Pat Casey

(signed) Herb Sorrell [22]

Wage Scales, Hours of Employment and Working Conditions

I. Studio Minimum Wage Scale

1.

No. Classification	Studio Rates	
	Schedule A*	Schedule C
"A" United Brotherhood of Carpenters and Joiners of America Studio Local No. 946 For those employees associated with organizations of or performing the duties of Journeymen, Carpenters, Woodworking Machine Men and Woodturners	Daily 6 hours 1½ after 6 Min. call** 6 hours	Weekly "On Call"
	Per Hour	Per Week
A-1 Construction and/or Maintenance Foreman	2.68½	165.25
A-2 Construction and/or Maintenance Gang Boss	2.56	
A-3 Journeyman and/or Maintenance Carpenter	2.25	
A-4 Apprentice Carpenter — 1st year	1.49	
A-5 Apprentice Carpenter—2nd year	1.57	
A-6 Apprentice Carpenter—3rd year	1.75	
A-7 Apprentice Carpenter—4th year	2.01	
A-8 Standby or Keyman	2.25	

*Schedule A off production employees are guaranteed a minimum employment of 36 hours within 6 consecutive days (excluding Sundays and Holidays) starting with the day of employment. After this minimum guarantee of hours has been fulfilled, employment may be continued on a daily basis until termination. Subsequent employment is subject to another minimum guarantee of 36 hours as above. Overtime hours (including Sundays, Holidays and Golden Hours) may be included in fulfilling the minimum guarantee of employment.

**Minimum call for A-1 and A-2 shall be 6½ hours for overlapping shifts.

2. Night Rates (Except for "on call" employees)—
 - a) Employees called to work between 6:00 a. m. and 8:00 p. m. shall receive a 10% premium for all time worked between 6:00 p. m. and 6:00 a. m.
 - b) Employees called to work between 8:00 p. m. and 4:00 a. m. shall receive a 50% premium for all time worked.
 - c) Employees called to work between 4:00 a. m. and 6:00 a. m. shall receive a 50% premium for all time worked until 6:00 a. m., and straight time for the remainder of the minimum call.
3. Studio wage scales shall prevail on all locations.
4. Present working conditions unless modified herein, to remain in effect. (Distant Location working conditions to be negotiated.)
5. New wage rates and guarantees of employment to be established effective July 15, 1946.
6. Retroactive pay based on new wage rates to be computed and paid from January 1, 1946. (New guarantees of employment, and new night rates are not retroactive.) [23]

EXHIBIT "B"

This Agreement, entered into this fifth day of February, 1925, by the several Local Unions of the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and the United Brotherhood of Carpenters and Joiners of America, situated in Los Angeles County, California, it is hereby agreed that:

First. The attached agreement (see below) between the two International Unions above named shall govern all working relations between the members of our Local Unions in this district and that in spirit and in letter we follow it to the end that no controversy shall be permitted to disturb operations on the lots or in the plants of producing managers.

Second. The liberal and co-operative spirit urged in the attached agreement between the two International Unions shall be especially followed so that the management can effectively and speedily prosecute the work with the men of our trades co-operating at all times.

Third. The following division of work would constitute a fair interpretation of the International agreement and that both parties to this agreement shall at once submit same to their International Presidents with the request that it be incorporated as a part of the International agreement for a permanent period.

Fourth. In event that a situation arises making it necessary that certain work is to be performed requiring immediate services of our members that it is understood and agreed that members of the United Brotherhood of Carpenters and Joiners of America shall assist members

of the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and vice-versa.

Fifth. Division of work, by the United Brotherhood of Carpenters and Joiners.

Section 1. All trim and mill work on sets and stages.

Section 2. All mill work and carpenter work in connection with studios.

Section 3. All work in carpenter shops.

Section 4. All permanent construction.

Section 5. All construction work on exterior sets.

Division of work, by the International Alliance Theatrical Stage Employees.

Section 6. Miniature sets.

Section 7. Property building. [24]

Section 8. Erection of sets on stages except as provided in Section 1.

Section 9. Wrecking all sets, exterior and interior.

Section 10. Erecting platforms for lamp operators and camera men on stages.

Signed

W. Longcries,
Recording Secretary 1692

L. W. Marshall,
President 1692

M. E. Richardson, B. A. 1692

M. G. Wilson, B. A. 884, Millmen

J. C. Kloos, Financial Secretary 1692

Wm. H. Donohue

S. B. Newman

John J. Riley

Cleve Beck

AGREEMENT

In compliance with the decision of the American Federation of Labor, a conference was called and held July 9, 1921, in the Executive Council Chamber of the American Federation of Labor. The organizations participating in the conference were represented as follows:

The United Brotherhood of Carpenters and Joiners of America:

Mr. Frank Duffy and Mr. John Cosgrove.

The International Alliance of Theatrical Stage Employees:

Mr. Harry L. Spencer, Mr. William F. Canavan,
Mr. Richard J. Green.

The American Federation of Labor:

Mr. Samuel Gompers, Mr. James O'Connell and Mr.
Hugh Frayne.

The entire subject of the differences of jurisdictional claims between the two first named organizations were thoroughly gone into with a view of reaching an agreement.

It is agreed by the International Alliance of Theatrical Stage Employees that all work done on lots or location and all work done in shops, either bench or machine work, comes under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America.

It is agreed that:

All carpenter work in and around Moving Picture Studios belongs to the carpenter. This includes:

1. Any and all carpenter work in connection with the Moving Picture Studios, the construction of stages or

platforms on which buildings or parts of buildings are to be erected.

2. All carpenter work in connection with the erection of any building or part of building, from which a picture is to be taken. [25]

3. The operation of all wood-working machinery in the making of all furniture, fixtures, trim, etc., for use in Motion Picture Studios, belongs to the carpenter.

The carpenters lay no claim to what is usually termed or referred to as the property man, or those employed in placing furniture, laying carpets, hanging draperies, pictures, etc.

It is clearly understood that insofar as Section 2 of this part of the agreement is concerned and particularly the right to the setting up and striking of the scenes on the stages after the construction work has been completed, it shall be liberally and co-operatively construed so as to do no injustice to either the United Brotherhood of Carpenters and Joiners of America or the International Alliance of Theatrical Stage Employes.

Any differences arising as to the interpretation of this agreement and particularly of Section 2 hereof, shall be adjusted by the International Presidents of both organizations.

For the United Brotherhood of Carpenters and for Theatrical Stage Employes:

Wm. F. Canavan,
Richard Green,
Harry L. Spencer.

Joiners of America:

John T. Cosgrove, First General Vice-President.
Frank Duffy, General Secretary.

[Union Label] [26]

EXHIBIT "C"

AGREEMENT

It is mutually agreed between Motion Picture Studio Grips' Local 80, of the I.A.T.S.E., and Motion Picture Studio Carpenters' Local 946, of the United Brotherhood of Carpenters and Joiners of America, as follows:

That Motion Picture Studio Carpenters' Local 946 shall have jurisdiction over:

1. All temporary and permanent building construction work and the maintenance of same. This shall not cover any building done for the purpose of photographing.
2. The installing and handling of all hardware and glass.
3. The complete building, erection, re-erection and remodelling of all sets, streets, parts of sets and retakes, including sufficient platforms for shooting same, but not including platforms used exclusively for the camera, lighting equipment and dolly tracks. Sets used for process or trick photography shall be considered the same as any other set.
4. The building and manufacturing of all grip equipment which is made of wood or wood substitutes.
5. All wood crating for shipping or storing.
6. The operation of all woodworking machinery.
7. The construction and remodelling of all cut-outs and the erection of same, with the exception of fold and hold cut-outs.
8. Heavy construction on all wooden diffusing frames.

9. The building or erection and dismantling of all scaffolds for construction, with the exception of tubular steel scaffolding.
10. Remodelling of all sets while shooting on studios or on location.
11. The underpinning and constructing of all platforms, with the exception of those used exclusively for camera, light and dolly track platforms.

That Motion Picture Studio Grips' Local 80 shall have jurisdiction over:

1. The handling of all sets and units from the mill to the stage, from stage to stage, from stage to scene dock, from scene dock to mill, and from scene dock to stage.
2. The handling and maintenance of all grip equipment.
3. The erection and handling of all fold and hold cut-outs.
4. The construction, maintenance and handling of all diffusing frames, with the exception of heavy construction on wooden frames. [27]
5. The building, erection and dismantling of all tubular steel scaffolding. This is not to include underpinning.
6. The construction of all platforms, including underpinning, for use exclusively by camera, lighting equipment and for supporting dolly tracks.

The agreement reflected in the setting forth of the above jurisdictional points is not intended by either party to reflect the full jurisdiction of these Locals in the

studios, but does reflect the agreement which has been reached between the representatives of Local 946 of the United Brotherhood of Carpenters and Joiners of America, and Motion Picture Studio Grips' Local 80, of the I.A.T.S.E., on the jurisdictional points which were at issue between these two local unions.

It is further recognized that some of the jurisdictional points to which Local 80 has agreed are at issue between the Carpenters' Local 946 and other local unions of the I. A. T. S. E., and this Agreement is not intended to reflect an agreement to these points for any I.A.T.S.E. local with the exception of Grips' Local 80.

Dated this 13th day of November, 1945.

Motion Picture Studio Carpenters' Local 946, of the United Brotherhood of Carpenters and Joiners of American.

(Signed)

James N. Skelton,
Eric E. Hokanson,
Maurice R. Nelson,
Roy V. Lockridge.

Motion Picture Studio Grips' Local 80, of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of United States and Canada.

(Signed)

W. C. Barrett,
Wm. Holbrook. [28]

EXHIBIT "D"

Chicago, Illinois

December 26, 1945

In conformity with the Executive Council directive handed down during the Cincinnati meeting, October 15-24, 1945, the special committee arrived in Hollywood, California, early in December. The directive carried specific instructions, reading:

"International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada—Brotherhood of Painters, Decorators and Paperhangers of America—United Brotherhood of Carpenters and Joiners of America, etcetera.

"Hollywood Studio Union Strike and Jurisdiction Controversy:

1. The Council directs that the Hollywood strike be terminated immediately.
2. That all employees return to work immediately.
3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.
4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.

5. That all parties concerned, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, the United Brotherhood of Carpenters and Joiners of America, the International Association of Machinists, the United Association of Plumbers and Steam Fitters of the United States and Canada, the Brotherhood of Painters, Decorators and Paperhangers of America, the International Brotherhood of Electrical Workers of America, and the Building Service Employees' International Union, accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render."

All parties agreed to accept the decision of the committee and to be bound thereby. Through committee arrangements made prior to arrival, all organizations involved in the dispute participated in the initial meeting held Monday, December 3, 1945. A definite method of procedure was agreed upon and there was unanimity of opinion on the plan established. [29]

Exhaustive hearings were conducted by the committee and a complete transcript, together with various exhibits were included in the record. Representatives of the Unions involved adhered to the following schedule:

Tuesday morning, December 4, 1945—Brotherhood of Painters, Decorators and Paperhangers of America.

Tuesday afternoon, December 4, 1945—International Brotherhood of Electrical Workers of America.

Wednesday morning, December 5, 1945—United Association of Plumbers and Steam Fitters of the United States and Canada.

Wednesday afternoon, December 5, 1945—Building Service Employees' International Union.

Thursday morning, December 6, 1945—International Association of Machinists.

Thursday afternoon, December 6, 1945—United Brotherhood of Carpenters and Joiners of America.

Friday, December 7 and Saturday afternoon, December 8, 1945—International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada.

On Saturday morning, December 8, the committee, along with one representative of each International Union listed in the Executive Council directive, visited the Paramount Studios in Hollywood. The committee investigated and inspected all phases of the work jurisdiction in dispute through questioning the participants and reviewing completed work and items in the process of development.

The investigation revealed that a large portion of the work has been in dispute over a long period of years. Records supplied from the files of the American Federation of Labor, including numerous agreements previously entered into, were made the subject of committee examination and study.

A number of International Unions not included in the Executive Council's directive requested permission to set forth their jurisdictional claims in the Motion Picture Industry. All such requests were denied and only those

Unions listed in the original directive were included in the committee explorations and findings.

An analysis disclosed that three possible methods of solution could be utilized, i. e.,

- (a) Strict adherence to craft or vertical lines of demarcation in the motion picture studios. [30]
- (b) Establishment of an industrial or horizontal union throughout the industry.
- (c) A division of work designations within the industry patterned after previous agreements, negotiated mutually by the various crafts.

After careful and thorough study the committee un-animously agreed that the latter plan is unquestionably the best method of approach. It is the committee's considered opinion that such procedure affords the only plausible solution to a most difficult and complex problem.

Accordingly, this decision is based on that premise and the below listed conclusions are final and binding on all parties concerned:

FINDINGS

1. Brotherhood of Painters, Decorators and Paperhangers of America:

The committee finds that Set Decorators in the motion picture studios come within the jurisdiction of the Brotherhood of Painters, Decorators and Paperhangers of America.

All work in connection with window frosting on "props" belongs to the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators

of the United States and Canada. Window frosting other than on "props" belongs to the Brotherhood of Painters, Decorators and Paperhangers of America.

The committee found that a local union known as the Screen Office Employees' Guild was chartered by the Brotherhood of Painters, Decorators and Paperhangers of America. Acting in an advisory capacity, the committee is of the opinion that all office workers in the motion picture studios rightfully come within the jurisdiction of the Office Employes International Union. It is to be understood that the committee is not deciding this question.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the Brotherhood of Painters, Decorators and Paperhangers of America by the American Federation of Labor.

2. International Brotherhood of Electrical Workers of America:

The committee finds that a workable agreement between the International Brotherhood of Electrical Workers of America and the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the [31] United States and Canada was entered into on September 1, 1926, and amended on April 15, 1936. The agreement, including amendments, reads:

"Division of work by the International Brotherhood of Electrical Workers of America:

Section 1. All permanent installation work.

Section 2. All generator rooms.

Section 3. All portable generator sets.

Section 4. The laying of conduit (the same is designated as iron pipe of various sizes and lengths and is not to be confused with, or misunderstood to apply to flexible stage cable).

Section 5. Installation and maintenance of all motors or generators where same are under the supervision of the electrical department of said studios.

Section 6. All repair work in and around the studio and all shop work, the same to apply to the manufacturing of new equipment and repairing of all electrical equipment. (April 15, 1936, Amendment.) In the taking and recording of sound motion pictures, the operating of all generators and storage batteries. The installation, construction, maintenance, repair, all shop work and all work Other Than operating, striking and setting of all sound equipment and effects used in taking and recording of sound motion pictures on stages and locations.

"Division of work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

Sec. 1. In the taking of motion pictures, the operating of all lights or lamps, and all lighting effects, and the setting up and striking same on stages or locations.

Sec. 2. The handling and operating of all equipment pertaining to the lighting of sets, such as plugging boxes, spiders, plugs, flexible stage cable, all lamps and all electrical effects pertaining to the tak-

ing of moving pictures such as wind, rain, snow, storm and all other effects, except where wind machine is operated electrically.

Sec. 3. The operating of all switchboards, whether they are permanent or portable, this is not to apply to generator rooms or portable generators sets, [32] which shall be operated by members of the International Brotherhood of Electrical Workers of America.

Sec. 4. The operation of all moving picture machines. (April 15, 1936, Amendment.) In the taking and recording of sound motion pictures, the operating of all sound equipment and all sound effects, and the setting up and striking of same on stages and locations."

The committee rules that in the taking and recording of sound motion pictures, the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada has jurisdiction over all running repairs. With that exception, the above quoted agreement, as amended, is and shall remain in full force and effect.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the International Brotherhood of Electrical Workers of America by the American Federation of Labor.

3. United Association of Plumbers and Steam Fitters of the United States and Canada :

The committee found that the representatives of the United Association of Plumbers and Steam Fitters of

the United States and Canada, and the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada were currently negotiating an agreement and that differences of opinion were allegedly not of a major nature. Accordingly, the following is set forth as defining the work jurisdiction of both Unions in the Motion Picture Industry:

1. Full recognition of the United Association of Plumbers and Steam Fitters of the United States and Canada over all plumbing and pipe fitting work on all permanent and temporary facilities required by the Motion Picture Industry.
2. The United Association shall:
 - (a) Handle, set and hook up all plumbing equipment and all piping, or substitute conveyance, on or in connection with the sets when such fixtures are practical—that is, when a shower is used in a picture [33] and water flows from same. This also applies to sinks, tubs and commonly known plumbing equipment.
 - (aa) The preceding paragraph (a) shall not apply when plumbing fixtures are of a dummy nature and are used solely for set dressing, or when a fixture is to be gagged or used as a special effect.
 - (b) Install all runs of piping up to the sets to take care of the supply of water, steam draining, air, oil, gas, refrigerant, vacuum or other utility.

- (c) Fill and drain all large tanks and pools and install all heating and filtering apparatus and equipment in connection therewith.
- (d) Install all piping in connecting with ice skating rinks and all plumbing equipment in connection therewith.
- (e) Install all piping for air, water and waste for camera and projection machines.
- (f) Install all piping for speaking tubes and sound conveyance.
- (g) Install all piping and equipment for air conditioning work for the purpose of heating or cooling and stages.
- (h) Install all sheet lead work.
- (i) Perform all welding, brazing, soldering and fusing of all joints in connection with the work of the United Association of Plumbers and Steam Fitters of the United States and Canada.
- (j) Install all sprinkler piping and equipment used in fire protection and fire control apparatus.
- (k) Install all refrigeration piping and equipment except when coming within the scope of paragraph (aa) hereof.
- (l) Install all chemical toilets and other portable plumbing convenience.
- (m) Maintain, repair, alter, service, dismantle and strike all work included herein.

3. The International Alliance of Theatrical Stage employes and Moving Picture Machine Operators of the United States and Canada shall:
 - (a) Handle and set all plumbing fixtures which are not practical, and which are used solely for set dressing. [34]
 - (b) Build, handle, install, maintain, repair, strike, store and operate all special effects and gag fixtures. This to include rain effects, fire effects, water curtains, et cetera. Gag fixtures to include all fixtures which operate in an abnormal manner for the purpose of creating an effect to be photographed or recorded. However, when such effects require piping by other than special effects men, members of the United Association of Plumbers and Steam Fitters of the United States and Canada shall be given jurisdiction over such construction.
 - (c) Build, handle, install, maintain, repair, store, strike and operate all properties not excepted above, regardless of the manner of construction or the material used.
4. Any plumbing and/or pipe fitting generally recognized as a part of the plumbing trade, not herein excepted, shall be the work of the United Association of Plumbers and Steam Fitters of the United States and Canada.

The committee rules that the above work division is to be placed in full force and effect immediately. This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering

with or disrupting any jurisdiction otherwise granted the United Association of Plumbers and Steam Fitters of the United States and Canada by the American Federation of Labor.

4. Building Service Employes' International Union:

The committee rules that the Building Service Employes' International Union has jurisdiction over the following classes of work in the Motion Picture Industry:

- (a) Police captains.
- (b) Police lieutenants.
- (c) Policemen.
- (d) Tour or clockmen.
- (e) Lot or set watchmen.
- (f) Fire captains.
- (g) Firemen.
- (h) Janitor foremen. [35]
- (i) Janitor gang bosses.
- (j) Janitors (male or female including porters and matrons).
- (k) Window washers.
- (l) Signalmen.
- (m) Flagmen.
- (n) Whistlemen.

Provided that the jurisdiction over sweeping and cleaning up of stages and sets belongs to the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise

granted the Building Service Employes' International Union by the American Federation of Labor.

5. International Association of Machinists:

The committee rules that the following language found in the American Federation of Labor, Boston, Massachusetts, Convention proceedings, October 6-17, 1930 (pp. 353-354), is applicable to the International Association of Machinists:

- “1. It is understood by both parties that members of the I.A. of T.S.E. are recognized to have jurisdiction to have charge of, to adjust, and operate all projectors and all appliance connected therewith.
2. It is understood by both parties that members of the I.A. of M. are recognized as having jurisdiction over the processes in the manufacturing of motion picture machines.
- 2a. It is agreed that members of the I.A. of T.S.E. shall have jurisdiction over the setting up and taking down of motion picture machines in such places as they are used for exhibition purposes.
3. It is agreed by both parties that when temporary emergency running repairs are necessary the operator will make such repairs that are necessary to keep machine in operation.”

The committee rules that the above work division be placed in full force and effect immediately. This decision is applicable to the Motion Picture Industry [36] and none other, and is not to be construed as interfering with or disputing any jurisdiction otherwise granted the In-

ternational Association of Machinists by the American Federation of Labor.

The committee takes cognizance of the fact that the International Association of Machinists has discontinued its affiliation with the American Federation of Labor and expresses the hope that re-affiliation will soon take place.

6. United Brotherhood of Carpenters and Joiners of America:

The committee rules that the division of work agreement entered into between the United Brotherhood of Carpenters and Joiners of America and the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada on February 5, 1925, and known as the "1926 Agreement" be placed in full force and effect immediately.

Division of work by the United Brotherhood of Carpenters and Joiners of America:

Section 1. All trim and mill work on sets and stages.

Section 2. All mill work and carpenter work in connection with studios.

Section 3. All work in carpenter shops.

Section 4. All permanent construction.

Section 5. All construction work on exterior sets.

Division of work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

Section 6. Miniature sets.

Section 7. Property building.

Section 8. Erection of sets on stages except as provided in Section 1.

Section 9. Wrecking all sets, exterior and interior.

Section 10. Erecting platforms for lamp operators and camera men on stages.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the United Brotherhood of Carpenters and Joiners of America by the American Federation of Labor. [37]

7. International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada:

The committee rules that the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada has jurisdiction over all work specifically designated and defined in the foregoing work divisions. It is understood, however, that such designation or definition shall in no wise affect jurisdictional grants awarded any National or International Union affiliated with the American Federation of Labor other than those to whom this decision is specifically made applicable.

This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of

the United States and Canada by the American Federation of Labor.

Signed:

Felix H. Knight, Chairman
W. C. Birthright,
W. C. Doherty,
Executive Council Committee
of the American Federation
of Labor [38]

EXHIBIT "E"

EMERGENCY WORKING CARD

Division of Set Erection

I.A.T.S.E. Local 468

11-18, 1946

Issued to E. Snow

under conditions set forth on back of this card

Not Transferrable

Revocable for Cause

[Union Label]

This card issued for work under the Jurisdiction of Local 468 of the I.A.T.S.E. and M.P.M.O. of U.S. and Canada. The undersigned in accepting this Emergency Working Card authorizes, designates and chooses the said Labor Organization to negotiate, bargain collectively, present and discuss grievances with the above employer as his representative and sole, exclusive col-

lective bargaining agency in all respects. The undersigned agrees to abide by the Constitution and By-Laws, decisions, rules, regulations, and working conditions of Local 468 of the I.A.T.S.E. and M.P.M.O. of U.S. and Canada. The undersigned will surrender this Emergency Working Card and the position held thereunder upon demand of Local 468. It is recognized that the issuance and acceptance of this Emergency Working Card does not entitle the undersigned to membership in Local 468 or to any rights against or within said Union.

Agreed to Elzyn Snow [39]

EXHIBIT "F"

Chicago, Illinois

August 16, 1946

Pursuant to instructions handed down by the Executive Council at its session held on August 15, 1946, the Hollywood Jurisdictional Committee reviewed the work division applicable to the United Brotherhood of Carpenters and Joiners of America as set forth in the Committee's decision dated December 26, 1945, and reaffirmed its previous decision.

The Committee took cognizance of the allegations contained in a report submitted to President Green by Organizer Daniel V. Flannagan under date of August 9, 1946. According to a brief embodied therein Studio Carpenters Local 946, U. B. of C. & J. of A., alleges that certain violations have taken place whereby the carpenters

jurisdiction set forth in the directive has been encroached upon.

Jurisdiction over the erection of sets on stages was awarded to the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada under the provisions set forth in Section 8 of the decision which specifically excluded trim and mill work on said sets and stages. The word erection is construed to mean assemblage of such sets on stages or locations. It is to be clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction.

Sections 2 to 5 inclusive recognized the rightful jurisdiction of the United Brotherhood of Carpenters and Joiners of America on all mill work and carpenter work in connection with studios, all work in carpenter shops, all permanent construction and all construction work on exterior sets.

In view of the alleged violations, the Committee hereby direct that all participants in the Hollywood Motion Picture Studio dispute strictly adhere to the provisions of the directive handed down on December 26, 1945.

(Signed)

Felix Knight

W. C. Birthright

W. C. Doherty [40]

EXHIBIT "G"

September 21, 1946

"Mr. W. J. Bassett, Secretary-Treasurer,
"Los Angeles Central Labor Council,
"536 Maple Avenue,
"Los Angeles 13, California.

"Dear Sir and Brother:

"Replying to your letter dated September 18th, the committee composed of members of the Executive Council who rendered a decision in the jurisdictional dispute which arose at Hollywood some time ago, resulting in strikes in motion picture studios at Hollywood, decided to clarify its decision, which it did at the last meeting of the Executive Council held at Chicago, Illinois, during the month of August.

"The committee explained that the clarification of its decision was for the purpose of making clear to all concerned the real meaning of its original decision.

"By direction of the Executive Council, copy of the clarification made by the Executive Council's committee was sent to the representatives of employers in Hollywood studios and to the representatives of unions interested and involved in the controversy.

"I hope and trust the pessimistic view which you express regarding the application of the clarification made

by the Executive Council's committee as set forth in the third paragraph of your letter will not prevail.

"I hope and trust that good judgment and common sense will be exercised by all affected and all concerned and that the decision of the committee members representing the Executive Council, and its clarification of its decision, will be accepted and applied in good faith by all concerned.

"It would seem most unwise and inexcusable for vicious fights to continue among unions functioning at Hollywood over a limited number of men whom each may claim come under their respective jurisdictions.

"Be assured that we will do everything that lies within our power to bring about the acceptance of the decision made by the committee representing the Execu- [41] tive Council, and of its clarification of its decision, both in spirit and in letter. All parties involved in the jurisdictional disputes agreed in advance of the decision of the committee to accept it and abide by it.

"It is my opinion that the Los Angeles Central Labor Council as a chartered American Federation of Labor central body should refrain from taking sides in any jurisdictional dispute at Hollywood. Your central body should use its good offices to bring about acceptance of the decision made by the committee representing the Executive Council, and the committee's clarification of said decision.

"(Signed) William Green, President
"American Federation of Labor." 42]

EXHIBIT "H"

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE
MACHINE OPERATORS OF THE UNITED
STATES AND CANADA, INTERNATIONAL
BUILDING, 630 FIFTH AVE., NEW YORK 20,
N. Y.

[I.A.T.S.E. Seal]

Affiliated with the American Federation of Labor

Hollywood-Roosevelt Hotel
Hollywood 28, California
April 14, 1945.

To All Former Studio Employees:

Because of the confusion which has existed with respect to the current controversy in the Motion Picture Studios, I am writing you this personal letter to give you the position and viewpoint of the International Alliance. I realize that you, as a member of one of the striking unions, have received a one-sided and biased story. Therefore, I want to give you this brief outline of the other side.

First of all, I want you to know that the International Alliance has reached an agreement with the Producers Association by which the I.A.T.S.E. will supply all labor to the studios, not only in our crafts which were recognized before the strike, but also in those classifications which have been vacated by the striking unions. The I.A. assumed this responsibility only after we were certain that it was impossible to reach an honorable settlement with those persons who are conducting this strike against the I.A.T.S.E.

This strike was called, presumably, because of a controversy over Set Dressers, the total number of which is 77, but of which number only 52 worked for the major producers. A great deal has been said to convey the impression that the controversy arose because of an arbitrary position by the I.A.T.S.E., but a complete review of the case will show beyond contradiction that had the Painters Union observed the proper governmental and trade union procedure for handling such matters, the controversy would never have arisen.

Briefly, let me say that in January of 1944, the I.A.T.S.E. had made a claim for the right to represent the Set Dressers because a substantial number of them had always be- [43] longed to the I.A. In denying the request of the I.A. for recognition as the bargaining agency for these men, the Producers promised the I.A. that neither it nor any other union would be recognized as the Bargaining Agency until such union had been certified by the National Labor Relations Board. In October of 1944 the Painters Union presented its case to the National Labor Relations Board so that it might be certified, but withdrew when the I.A. was allowed an opportunity to present its position in the matter. As everyone knows, a strike was called then in an effort to force the Producers to recognize the Painters as the Bargaining Agency, irrespective of the rights of the I.A.T.S.E. under the National Labor Relations Act. Since that time the Painters Union has made a series of threats which have apparently influenced some governmental agencies, but all of which have been for the purpose of keeping the dispute from the proper governmental tribunal, the National Labor Relations Board. Finally,

these threats culminated in the actual strike which took place on March 12th, more than a month ago.

There was no more justification for the March 12th strike than there was for the October 5th strike, but now we all recognize that the Set Dressers' dispute was only the excuse for the March 12th strike and not the real reason for it. The real reason was the demand on the part of the Carpenters and other crafts for the jurisdiction which the I.A. has had for years in the studios. For many years these crafts have coveted the jurisdiction which the I.A. Unions have enjoyed, and they apparently feel that with the war shortage of manpower, this was their opportunity to take it by force. The I.A. has responded in the only way that it could respond, by preventing these unions from shutting down the studios. For three weeks every possible effort was made by the I.A.T.S.E. to bring about an honorable settlement of this dispute. At the end of that time it was very evident to everyone that there was no basis for an honorable settlement; that the only adjustment that could be arrived at was a settlement which would destroy the jurisdiction which the I.A.T.S.E. has fought for and enjoyed for many years. The decision was therefore made that the I.A. would not surrender, but that it would defend itself with all the power at its command.

On Tuesday night of this week a Carpenter's Local was chartered and is now *known* as Local No. 787 of the I.A.T.S.E. On Thursday night, the Motion Picture Studio Painters, Local No. 788 of the I.A.T.S.E. was chartered. In addition to these Locals, there will be a local charter for Machinists, and if necessary for other crafts. We are proceeding in accordance with our agreement with the Producers to man the studios. [44]

If you as a former employee of the studios want to come back we are anxious to have you do so and we shall make it as easy as possible for you. To this end, I want to inform you that those men who come back at once will be taken into these newly established unions without the payment of any initiation fee. You will be given membership in an autonomous local union of the I.A.T.S.E., which will elect its own officers, negotiate its own agreements, and otherwise conduct its own affairs as a local union, in accordance with the Constitution and By-Laws of the I.A.T.S.E.

I hope that you will decide to come back to work in the studios, but if you do not we will have to bring in the men necessary to man these studios. They must and will be kept rolling—for the protection of the thousands of our members and their families whose livelihood depends upon the moving picture industry.

I recognize the difficulty which you as an individual workman must face in making this decision, but in making it we ask you—do not be deceived by the men who led you out on this strike and have since made promise after promise all of which have been successively broken.

As the International President of the I.A.T.S.E. I assure you that having assumed this jurisdiction, we will stake the entire strength of the International Alliance on our efforts to retain it. We believe, we know, we will be successful. In the light of this we hope that you will decide to come back and, as a member of the I.A.T.S.E., assume your former position in the studios before we find it necessary to bring outside men to fill the jobs.

Yours very truly,

(Signed) Richard F. Walsh,

International President [45]

EXHIBIT "I"

August 31, 1946

Association of Motion Picture Producers, Inc.
5504 Hollywood Boulevard
Hollywood 28, California

Gentlemen:

I have received from President Green of the American Federation of Labor a communication inclosing a copy of a statement described as "clarification" of the decision in the Hollywood jurisdictional dispute, made by Vice-Presidents Knight, Birthright and Doherty, dated December 26, 1945.

It is the contention of this International Union that this so called "clarification" was issued without authority and in violation of the Cincinnati Agreement to which this International Alliance, yourselves, and the other International Unions involved, were all parties. The Cincinnati Agreement in making provision for the creation of the three man committee, specifically provided that the parties thereto accept the Committee's decision as final and binding.

If the Committee's decision as originally rendered is not fully complied with by you this International Alliance will take such action as may be necessary to protect its interests.

Yours very truly,

Richard F. Walsh (signed)

International President [46]

EXHIBIT "J"

[I.A.T.S.E. Seal]

[I.A.T.S.E. Seal]

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE
MACHINE OPERATORS OF THE UNITED
STATES AND CANADA, INTERNATIONAL
BUILDING, 630 FIFTH AVE., NEW YORK 20,
N. Y.

Affiliated with the American Federation of Labor

(4370

Telephones: Circle 5-(4371

(4372

New York 20, N. Y.,

September 13, 1946

To all Hollywood Studio Local Unions of the I.A.T.S.E.
and the members thereof:

I have been informed that certain Unions not affiliated with the I.A.T.S.E. may establish stoppages, strikes, boycotts or picket lines at the Hollywood Studios or some of them.

By virtue of my authority as International President and pursuant to authorization of the General Executive Board and in accordance with the mandate of the last Convention of the I.A.T.S.E., I hereby officially notify you:

1. That such stoppages, strikes, boycotts and picket lines are in direct opposition to the best interests of the I.A.T.S.E., its Local Unions and its membership, and are not in any way to be recognized, honored, or supported by you, and you are not in any way to refuse to render service because of them.

2. That until the end of the Hollywood Studio emergency, as determined by the General Office, you are not

to observe any trade jurisdictional lines in the Hollywood Studios; except that you are not to deem this as an authorization to work in the jurisdiction of any local union whose members are not engaged in any stoppage, strike, boycott or picketing.

3. That the finished product of these Studios bears the label of the I.A.T.S.E. and it is my duty to protect that label and that product for the best interests of the I.A.T.S.E. as a whole, its Local Unions and membership.

4. That no other organization shall be permitted, directly or indirectly to infringe upon the jurisdiction of the I.A.T.S.E. or its Local Unions in the Hollywood Studios; and that the employment of the members thereof shall not be interfered with or adversely affected. [47]

5. That the source of supply for the amusement industry throughout the United States and Canada shall not be interfered with and the employment of I.A.T.S.E. members throughout these countries shall not be adversely affected.

6. That Internatiol Representative Roy M. Brewer is hereby authorized and directed to carry out the foregoing and to implement the same as in his judgment the circumstances warrant.

(Signed) Richard F. Walsh

Richard F. Walsh

International President

International Alliance Theatrical Stage Employes
and Moving Picture Machine Operators of the
United States and Canada.

[Unions Labels] [48]

[Verified.]

[Endorsed]: Filed Jan. 3, 1947. [49]

[Title of District Court and Cause]

APPEARANCE AND NON-RESISTANCE OF
JUDGMENT BY UNITED BROTHERHOOD
OF CARPENTERS & JOINERS OF AMERICA

Comes now the United Brotherhood of Carpenters & Joiners of America, named as defendant herein, and by its counsel enters its appearance herein as to both the original and amended complaints on file herein, and does not contest the granting of the prayer of plaintiffs' amended complaint.

Dated: This 8th day of January, 1947.

HARRY N. ROUTZOHN

Attorney for United Brotherhood of Carpenters &
Joiners of America

[Endorsed:] Filed Jan. 9, 1947. [50]

[Title of District Court and Cause]

MOTIONS BY DEFENDANTS, INTERNATIONAL
ALLIANCE
~~ASSOCIATION~~, ETC., AND BREWER, TO
DISMISS

The defendants International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada (named in the caption of the Amended Complaint herein as International Association of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada) and Roy M. Brewer, and each of them, severally move the Court as follows:

(1) To dismiss the action as to the defendant International Alliance, etc., because the Amended Complaint fails to state a claim against said defendant upon which relief can be granted.

(2) To dismiss the action as to the defendant Roy M. Brewer because the Amended Complaint fails to state a claim [51] against said defendant upon which relief can be granted.

(3) To dismiss the action because the Amended Complaint fails to state a claim against said defendants International Alliance, etc., or Roy M. Brewer, jointly or severally, upon which relief can be granted.

(4) To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter for the reason that jurisdiction is not vested in this Court by Section 400, Title 28, United States Code Annotated; nor by Sections 41(1), 41(8), 41(12), or 41(14), Title 28, United States Code Annotated; nor by Section 729, Title 28, United States Code Annotated; nor by Sections 43 and 47(3), Title 8, United States Code Annotated; nor by Section 157, Title 29, United States Code Annotated; nor by Amendments V or XIV of the Constitution of the United States; nor by any provision of the Constitution of the United States; nor by any provision of the Statutes or Laws of the United States;

(5) To dismiss the action on the ground that the Court lacks jurisdiction because, as appears from the face of the Amended Complaint, the diversity of citizenship necessary for jurisdiction does not exist.

(6) To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in con-

troversty is less than three thousand dollars, exclusive of interest and costs.

This motion will be made upon the Amended Complaint on file herein, the Notice of Motion and Points and Authorities in support thereof, and the Affidavit of the defendant, Roy M. Brewer, hereto attached, by reference incorporated herein and made a part hereof. [52]

Dated: January 11, 1947.

BODKIN, BRESLIN & LUDDY
HENRY G. BODKIN
GEORGE M. BRESLIN
MICHAEL G. LUDDY

By Michael G. Luddy

453 South Spring Street
Los Angeles, California
Phone: MUtual 3151

(Attorneys for Defendants, International Alliance, etc.,
and Brewer)

NOTICE OF MOTION

To: Zach Lamar Cobb, Esq., and Bates Booth, Esq., 453
South Spring Street, Los Angeles, California, At-
torneys for Plaintiff

Please Take Notice that the undersigned will bring the above motions on for hearing before this Court at the Court Room of the Honorable Ben Harrison, Court Room No. 6 of the United States Post Office and Court House Building, in the City of Los Angeles, County of Los Angeles, State of California, on Monday, the 27th day of

January, 1947, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard.

Dated: January 11, 1947.

BODKIN, BRESLIN & LUDDY
HENRY G. BODKIN
GEORGE M. BRESLIN
MICHAEL G. LUDDY

By Michael G. Luddy

453 South Spring Street
Los Angeles, California
Phone: MUtual 3151

(Attorneys for Defendants, International Alliance, etc.,
and Brewer) [53]

[Title of District Court and Cause]

AFFIDAVIT OF DEFENDANT ROY M. BREWER
IN SUPPORT OF HIS MOTION AND THE
MOTION OF THE DEFENDANT INTERNA-
TIONAL ALLIANCE, ETC., TO DISMISS

State of California, County of Los Angeles—ss.

Roy M. Brewer, being first duly sworn, does on oath depose and say that he is one of the defendants in the above entitled action and makes this affidavit in support of his motion and the motion of the defendant International Alliance, etc., to dismiss this action. At the time of filing of the Complaint herein, affiant was, and for some time prior thereto had been, [54] ever since has been, and now is a resident, citizen, and registered voter of the State of California, residing in the City of Los Angeles, County of Los Angeles, and State of California.

For more than nineteen years last past, affiant has been and now is a member of The International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States, a voluntary unincorporated association, hereinafter called The Alliance, and for several years last past affiant has been and now is a duly appointed, qualified, and acting international representative of The Alliance, and ever since on or about March 12, 1945, has been and now is assigned, as such international representative, to Hollywood and in charge of the Hollywood studio situation in so far as such situation, more particularly hereinafter set forth, relates to and affects The Alliance, its constituent Locals, and membership as a whole.

The Alliance is an international labor union, with headquarters in the City of New York, State of New York, having approximately 800 constituent Locals with a membership of approximately 60,000; approximately 750 of said constituent Locals are situated in various cities and communities throughout the United States of America with a membership of approximately 55,000. The Alliance was organized on July 17, 1893, affiliated with the American Federation of Labor in July, 1894, and affiliated as an international union on October 1, 1902; it now is, and for many years last past has been, affiliated with the American Federation of Labor. Members of the Alliance are those persons who are members in good standing of said constituent Locals, and the greater portion of all such members are engaged in the production, distribution, and exhibition of motion picture film. Fourteen of said Locals, with a membership in excess of 15,000, known as Studio Locals, are situated in the Hollywood area, and all of their members are employed in the production of

motion picture films by studios situated in the County [55] of Los Angeles, State of California; their employers are hereinafter referred to as The Studios.

Ever since its organization, The Alliance has been and now is the dominant labor union in the amusement industry in this country, including the production, distribution, and exhibition of motion picture films. From the beginning of the motion picture industry, and for many years thereafter, The Alliance, through its constituent Locals, furnished to the Hollywood studios employees engaged in the production of films; on at least two occasions during the past twenty-five years when The Alliance and its constituent Studio Locals went out on strike for the purpose of obtaining higher wages and better and improved working conditions, the members of certain other crafts not affiliated with The Alliance, such as Brotherhood of Painters, Decorators and Paperhangers of America, hereinafter called the Painters; United Brotherhood of Carpenters and Joiners of America, hereinafter called the Carpenters; International Brotherhood of Electrical Workers of America, hereinafter called the Electricians; and International Association of Machinists, hereinafter called the Machinists, entered the Studios and took over the work and jurisdiction formerly had by members of The Alliance who were on strike, with the result that in each instance such strikes were without success, and in one instance almost disastrous to the Studio Locals of The Alliance and their members. In 1933, during one of such strikes, the membership of the Studio Locals of The Alliance dropped from approximately 9,000 to approximately 200. The Alliance, however, in each instance was eventually successful in getting back the jurisdiction which had been vested in it prior to

such strikes, and attempts were made from time to time to negotiate agreements whereby jurisdictional controversies existing between The Alliance and such other crafts might be amicably adjusted, all without success.

The Studios, in negotiations and in contracts resulting [56] therefrom, have for many years recognized The Alliance and its Hollywood Locals as having jurisdiction over certain work classifications, and in August of 1939, pursuant to an election held under the supervision and jurisdiction of the National Labor Relations Board, The Alliance was certified as the legal bargaining agent of a large number of work classifications (14 NLRB 1162). Ever since said certification of The Alliance by the National Labor Relations Board, said other crafts, through hostility, antagonism, and jealousy, have sought to obtain, in one fashion or another, including litigation in the Superior Court of the State of California, in and for the County of Los Angeles, before the National Labor Relations Board, and other Federal agencies, by jurisdictional strikes and stoppages, by the exercise of economic pressure, by picketing, violence, threats, and unlawful conduct, and thus to take away from The Alliance and its members working in the Studios, a large part of the jurisdiction and job classifications vested in it and them, pursuant to contracts entered into between The Alliance, as the bargaining agent of said Studio Locals, and The Studios.

For several years last past, there has existed in Hollywood an organization known as the Conference of Studio Unions, hereafter referred to as CSU, of which one Herbert K. Sorrell was for many years last past, and now is, president. The CSU ever since its organization

has been and now is composed of a miscellany of labor elements, including Machinists, Painters, Carpenters, and others, which have at all times been hostile to The Alliance, and it is the successor instrument of two groups which on occasions during the past ten years have sought by all means within their power to destroy, if possible, and if that was not possible, to curtail, the power and position of The Alliance as the overwhelmingly dominant labor organization in the motion picture industry. The Alliance in the past was successful in defeating the efforts of such prior organizations, to wit, Federation of Motion Picture [57] Crafts and United Studio Technicians Guild. The CSU began its fight on The Alliance at the point where its defeated predecessors left off. In the negotiations with The Studios held in 1942 and 1944, The Alliance claimed jurisdiction over the work performed in The Studios by persons known as Set Dressers or Set Decorators, and in the summer and fall of 1944 Screen Set Designers, Local 1421, a constituent Local of the Painters, and a member of the CSU, likewise claimed such jurisdiction. The members of the CSU engaged in work stoppages at The Studios for two days in October, 1944, in an unsuccessful attempt to force The Studios to recognize said Local 1421 as the bargaining agent of said Set Dressers. On March 12, 1945, while proceedings were pending before the National Labor Relations Board, 21st Region, Los Angeles, California, on the consolidated petitions of The Studios and Local 1421, in which proceedings The Alliance was an intervenor, for the purpose of determining, among other things, whether said Local 1421 or The Alliance had jurisdiction over and was legally entitled to represent such Set Dressers, Local 1421 called a strike, and pursuant to prearrangement between Local

1421, with Sorrell as its leader and spokesman, and the business agents and other officers of the Machinists, Carpenters, Electricians, and other crafts constituting the membership of the CSU, a picket line was thrown around The Studios. No issue of wages or working conditions was involved in said strike and same was actually not a strike against The Studios, but was a strike against The Alliance and was so recognized and treated by The Alliance.

This strike was condemned by the National War Labor Board, the American Federation of Labor, with which all members of the CSU were then affiliated, and by the International President of the Painters' Union, with which said Local 1421 was affiliated. It was in violation of the no-strike pledge during war-time given to the President of the United States. While the strike was ostensibly [58] called in connection with a controversy over the jurisdiction of said Set Dressers, the leaders of said other crafts stated that the strike would not be terminated until the claims which they were making in and to jurisdiction held by The Alliance were granted and such jurisdiction was taken away from the Alliance.

In March, 1945, shortly after said strike was declared, Richard F. Walsh, pursuant to the authority vested in him by the Constitution and By-Laws of The Alliance, as its International President, directed that the picket lines established by CSU around The Studios be ignored and not respected by members of The Alliance working in The Studios and that such members should do all work which they were capable of doing when requested by The Studios, even though this mean working out of their classification in order to keep The Studios open and thus

furnish employment, not only for members of The Alliance working in The Studios, but members throughout the United States and Canada employed in film exchanges and in the theatres exhibiting motion picture film, provided, however, that no member of The Alliance working in The Studios was to do any work which was being done by labor organizations whose members were ignoring the picket lines and in compliance with their contracts and pledges of no strike were reporting to The Studios for work.

Conferences were held between October 14 and October 24, 1945, at Cincinnati, Ohio, attended by representatives of The Studios, Richard F. Walsh, as International President of The Alliance, the International Presidents or other representatives of the Unions whose constituent Locals were affiliated with the CSU, and the members of the Executive Council of the American Federation of Labor. Said Executive Council, as a result of such conferences, issued an order directing (a) that the strike be terminated and that all members return to work immediately; (b) "that for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute"; (c) "that after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of [59] Labor shall investigate and determine within thirty days all jurisdictional questions still involved"; and (d) "that all parties concerned, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, the United Brotherhood of Carpenters and Joiners of America, the International Association of Plumbers and Steam Fitters of the United States and

Canada, the Brotherhood of Painters, Decorators and Paperhangers of America, the International Brotherhood of Electrical Workers of America, and the Building Service Employees' International Union, accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render." All parties, to wit, The Studios and the various labor organizations last above named, being the international unions affected, agreed to accept the decision of the committee and to be bound thereby. Subsequently, and on the 26th day of December, 1945, said committee rendered its decision, true and correct copy of which is attached to the Amended Complaint herein, marked Exhibit "D," (Pararagraph 6, Pages 14-15 thereof), jurisdiction over the erection of sets in the Hollywood Studios was determined to be in The Alliance, and, also, as a result of said decision, jurisdiction over certain other work classifications which had previously been enjoyed by The Alliance was taken away from it and given to other Unions. The CSU and, particularly, the United Brotherhood of Carpenters and Joiners of America, hereinbefore and hereinafter called the Carpenters, and the International Association of Machinists, hereinafter called the Machinists, and the International Brotherhood of Electrical Workers of America, hereinbefore and hereinafter called the Electricians, which last three labor organizations at all times have been and now are through their constituent Locals in the Hollywood area, affiliated with the CSU, were dissatisfied with and unwilling to accept the decision of said committee. At a meeting of the Executive Council of the American Federation of [60] Labor held at Miami, Florida, in the latter part of January, 1946, attended by representatives of The

Studios, Richard F. Walsh as International President of The Alliance, and the International Presidents of said dissatisfied unions, an attempt was made by the latter to persuade said Executive Council to set aside the decision of said committee, which the Executive Council refused to do upon the ground that all of the parties had agreed at Cincinnati that the decision of said committee would be final and binding. In January of 1946, the decision of said committee was put into effect, and continuously from said date to the present time The Alliance has had and exercised jurisdiction over the erection of sets in The Studios. The Carpenters and the CSU have at all times refused to recognize the committee's decision and almost daily from January, 1946, down to the resumption of the jurisdictional strike in the Hollywood Studios, strike threats were made by Sorrell and other spokesmen for the CSU.

The International Association of Machinists was in the fall of 1945 suspended by the American Federation of Labor for non-payment of dues, and thereafter in January of 1946 its affiliation with the American Federation of Labor was completely severed. This gave rise to additional controversy in The Studios. In July of 1946, Sorrell and the CSU seized upon this problem to declare a strike because of a jurisdictional dispute with respect to machinist work in The Studios. The CSU supported the Machinists' Union despite the fact that it was no longer affiliated with the American Federation of Labor, and all of the other labor organizations in The Studios affiliated with the American Federation of Labor, but not affiliated with the CSU (including The Alliance), supported the Federal Union of Machinists, No. 23968, chartered directly by the American Federa-

tion of Labor with jurisdiction over Machinists employed in the Studios. This strike, after being in effect for two days, was settled by an agreement which, among other things, [61] provided that the question of jurisdiction over and the bargaining representative for the Machinists would be determined upon a petition filed by The Studios with the National Labor Relations Board.

During the summer, and particularly the months of July and August, of 1946, threats of renewed strike by Sorrell and the CSU were made with increasing frequency. In September, 1946, Sorrell and the CSU demanded of the Studios that the work of erecting sets be taken from members of The Alliance and be given to members of the Carpenters' Union upon the alleged ground of a purported "clarification" of the decision, Exhibit "D" of the Amended Complaint. The Alliance vigorously opposed this demand, taking the position, as did The Studios, that they were parties to the original Cincinnati agreement and directive in October, 1945, and that all parties thereto had agreed that the decision of the American Federation of Labor Executive Council Committee of Three should be final and binding, and The Alliance and The Studios declined to accede to the demands of Sorrell and the CSU. Subsequently, and after declaration of the strike beginning in September, 1946, more particularly hereafter described, said Committee announced that it had not issued the so-called statement of clarification and that it had at all times intended that jurisdiction over the erection of sets should be allocated to The Alliance as set forth in its decision. The jurisdictional cauldron, which in January, 1946, was simmering, and in July of the same year was seething, boiled over. The members of the CSU declared all sets erected

by members of The Alliance to be "hot" and refused to do their allocated work thereon or in connection therewith, and upon such refusal were either discharged or requested to leave the premises by The Studios.

Sorrell and his CSU on September 26, 1946, declared a strike against all of the major Studios in the Hollywood area, [62] which strike was for the purpose of compelling The Studios to take away from The Alliance jurisdiction over the erection of sets and grant such jurisdiction to the Carpenters.

As a result of the determination of the Three-Man Committee of the Executive Council of the American Federation of Labor, said Exhibit "D" (Paragraph 6, Pages 14-15 thereof), that The Alliance had jurisdiction over the erection of sets, approximately 315 members of the Carpenters' Union, of which the plaintiffs and others whom they purport to represent in this action are members, were by The Studios removed from the work of erecting sets, and such work was taken over by members of The Alliance in January of 1946, and The Alliance ever since has had and now has jurisdiction over such work classification in The Studios. Neither The Alliance nor The Studios have at any time in any manner prevented, or sought to prevent, the plaintiffs or any member of the Carpenters' Union from performing the work, in The Studios, classified as carpenter work, but ever since September 26, 1946, the members of the Carpenters' Union have refused to work in The Studios, and still so refuse to work, solely because members of the Carpenters' Union have not since January, 1946, been employed in The Studios as Set Erectors. That The Alliance does not now have and for many years last past has not claimed jurisdiction over the work classified as carpenter work in

The Studios, and it does not now and for many years last past has not claimed jurisdiction over the work which was performed by other crafts belonging to the CSU who went out on strike on September 26, 1946. That when said strike was declared, there were approximately 1300 persons employed in The Studios as Carpenters, and said persons have not since September 26, 1946, been employed in The Studios solely because of their refusal to work therein.

The controversy between The Alliance and the CSU, and particularly with the Carpenters' Union, of which the plaintiffs and others whom they purport to represent are members, is a juris- [63] dictional controversy, and all of the Carpenters and other members of the CSU now out on strike are refusing to work in The Studios solely because approximately 315 jobs, which prior to January, 1945, had been filled by Carpenters who were erecting sets, have since said date been filled by members of The Alliance.

In the Studios, it is not the nature of the work done, but the use to which the article being worked upon is put, which frequently determines which labor organization has jurisdiction over the workmen doing the work. The Alliance has complete jurisdiction over the Property Department in The Studios. The Property Department means the department in which props are kept, maintained, constructed, and repaired, and a prop is any article, such as a rug, desk, chair, drape, or bric-a-brac used on a set. The property men of The Alliance maintain, construct, and repair all props. The men doing this work are experience carpenters, machinists, and plumbers, as such words are commonly used in the Building Trades Crafts.

That upon information and belief, affiant states that some of the plaintiffs in this action are still working in The Studios, and that such of the plaintiffs who are not working were during 1946, and up to on or about September 26 of that year, steadily and continuously employed in The Studios as Carpenters, and if they have not been employed in The Studios as Carpenters since September 26, 1946, it is due to their refusal so to work and not due to any act or conduct on the part of The Alliance or any of its officers or agents.

The circumstances leading up to and surrounding the jurisdictional strike of the crafts affiliated with the CSU occurring in 1945 and the present jurisdictional strike which began on September 26, 1946, are fully and correctly stated in an extemporaneous report delivered to the delegates assembled in convention of The Alliance in July, 1946, by Richard F. Walsh, International [64] President of The Alliance, true and correct copy of such extemporaneous report being hereto attached, marked Exhibit "I," by reference incorporated herein and made a part hereof.

That ever since the decision of the Three-Man Committee of the American Federation of Labor was put into effect in January, 1946, The Alliance, through its duly chartered constituent Local No. 468, has had and exercised jurisdiction over the erection of sets in the Hollywood Studios.

(Signed) ROY M. BREWER

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the County of Los Angeles, State of California, this 10th day of January, 1947.

(Signed) A. B. LUDDY

(Notarial Seal)

Notary Public [65]

EXHIBIT "I"

* * * * *

International President Walsh: Delegates to the Convention, I could have sat down and probably dictated a report on the Hollywood situation and had it read to this Convention, but it is so important to the International Alliance as a whole that I deemed it advisable to make the report to you myself.

I have lived this report: I am not just writing it. In the past, and this is no reflection upon the other International president, they have seen fit to assign International representatives or vice-presidents to go out to Hollywood. I have gone out myself. I wanted to see just what was going on.

I have sat out there where you are now sitting and I have been listening for years and years to Hollywood. I have listened to Hollywood when we had approximately 200 paid-up members out there. That is not so far back: I believe it was the 1932 convention. At the 1934 convention I listened to delegates, who did hold the challenge by working some place else and paying their per capita tax to the Alliance, stand upon the floor of this convention and practically beg that we assist them.

I listened to the story of the 1933 strike. You know what happened. You know that the union men of the I.A.T.S.E., working in studios in Hollywood, walked out of the studios in support of the Soundmen's Local. You know the story of how they were run over by the other trades, going into the studios to take their jobs.

When that strike was called, we had about 9,000 members, I think, in Hollywood. When these, if I may call

them, villain trade unions had cut up our jurisdiction out there, we had less than 200 paid-up members in this Alliance.

It was not easy to get back into the studios. We practically had to kick our way back. I handled assignments, one outside of the city of Worcester, where we attempted to get a laborer on the job when they were shooting that location picture. I can report to you that we were not successful in even placing the laborer.

You know the story of "Thirteen Hours By Air?" where the International Brotherhood of Electrical Workers insisted that the camera men [66] carry a Brotherhood card before they could come to the Newark airport to photograph that picture.

I go over a little bit of this history so that you will know what has happened in this fight. We had to practically threaten to strike all of the theatres in the United States in order to get back into the studios.

In the city of Chicago here, where the fight was spear-headed, some of the men reported for work; the sound didn't work right; sometimes the picture didn't go on; and then later on, they had to report down to the Union to see what was going on down there, until finally the heads of the producing firms decided to sit and meet with your then International president.

They met in the city of New York, and we forced our way back into the basic agreement. Not alone did we force our way back into the basic agreement, but for the first time in the history of Hollywood, we forced a closed shop issue, and we signed a closed shop contract.

Maybe that was the start of our troubles because I.A.T.S.E. forced the closed shop. Then they went to

work and assisted the other unions in the studios to get their closed shops.

However, time went on. We didn't get all our jurisdiction back that we had when we left, but we worked along with everybody, assisted some of them who could not even get into the studios. We assisted them to get recognition from the producers. One I know is the plumbers. They wouldn't even recognize the plumbers. However, the International president at that time made sure that they got a contract from the producers.

At the time that I became president of the Alliance, we had agreements with the studios and all the other crafts had agreements with the studios. There was no complaint made to me as International president of any violation of jurisdiction by our members in Hollywood, with the exception of the Brotherhood of Electrical Workers, which complained about our sound local out there infringing upon their jurisdiction, and we were investigating it.

We had sent the general secretary-treasurer out there, with a man appointed from the Electrical Workers, to review the situation to see if he could adjust it.

We went into negotiation in 1942 with a studio contract. At the time I became president, they had been trying to negotiate this contract for approximately a year. They came into the city of New York, and they sat there. I think, for some 27 days, these committees from Hollywood, and could get no results. I was only vice-president of the Alliance at that time, but I called the committees together and told them that there was no chance of getting any results then because of the trouble

the International Alliance was in, and that its International president was on trial.

I made a promise to that committee. I said, "Go back to Hollywood. [67] When this is over, no matter what happens, I, as an international vice-president, assure you that you will get a contract in Hollywood; and if you don't get a contract in Hollywood, I will no longer be a vice-president of this Alliance."

That committee went back to Hollywood. They went back satisfied. History will tell you that after I was elected International president, the first thing I did was to go to Hollywood, call together the executive boards of the various locals, and I well remember, because it was a few days after the war had started—in fact, I went on a plane the day that Pearl Harbor was raided. It was set down and couldn't fly into Hollywood.

I got the executive officers of those locals together, and I said, "Here is the proposition. I can help you negotiate this contract here in Hollywood, or I can help you negotiate the contract in New York City where the heads of the producing firms are located. Personally, I think the contract can be negotiated much more quickly in New York than it can in Hollywood. However, I will let your executive boards decide where to do the negotiation."

They decided to come to New York. We negotiated, I think, a pretty fair contract because they were all pretty well pleased. At the time that we were negotiating this contract, there arose a controversy as to people known as set decorators. It proved that we didn't have them altogether in our unions at that time, and I told the representative of the local union who was trying to negoti-

ate for them to leave that matter rest and go back home and see if he couldn't organize it just a little bit better.

In 1944, we again came back to New York to negotiate the 1944 contract. The set decorators' case came up again. There were more of them organized; some of them were working under the jurisdiction of Local 44, and most of them under the jurisdiction of their own independent guild, not affiliated with anybody.

The producers raised the question that they had a contract with these people that had several years to run, and they could not negotiate with us at that time because we were not the bargaining agents for the set decorators.

We again agreed with the producers to postpone negotiation or any action on it, telling him that if anybody else tried to negotiate for them that we expected that we would have the right to do it and not the other party; that if that was disputed, that we would have to prove that we had the bargaining rights for them.

That was agreed upon with the producers. The contract was completed and the committees went back home. A new angle entered into it. The Paperhangers and Painters of America issued a charter to the set decorators, took them into their International Union. They took them into the local known as 1421. [68]

They went to the producers and said, "We want to negotiate for the set decorators." The producers told them that they had told the I.A.T.S.E. that if they wanted to negotiate for them, they would have to prove that they were the bargaining agents, and they also told the painters and decorators of America that they would have to do the same thing.

They then filed for bargaining rights. We intervened. There were many things that would have to be proven and many parts of the case decided by the National Labor Relations Board. We had to prove that we represented ten per cent of the people or else we couldn't intervene. We went to the hearing and proved that we represented better than ten per cent, and we were permitted to intervene.

They then withdrew their case from the National Labor Relations Board, and called a strike in the studios. It was October of 1944, I believe. That strike was of short duration. Of course the forces fighting the International Alliance out there at that time were not too well organized. Not too many people paid any attention to the strike, and when the War Labor Board issued its mandate to go back to work before they even would consider the case, they were glad to go back to work. We did.

The War Labor Board then took jurisdiction over this case. They tried to adjust it by mediation, at which time I appeared, and that was not possible, because we contended and we still contend, that the set decorators belonged to us.

Before I go any further, I would like to describe what a set decorator is. He works in the studio and in the property department of the studio. At the time that I worked there, we recognized him as a property man. He is a man who is sent in, and if he was told to dress this convention hall so it could be photographed, he would order the men who work under him to put these flags up, arrange the tables, arrange the platform and the rostrum, and that would be his job. He goes over to the storehouse and picks out all

of the decorations, and gives instructions to our property men to handle it. He does no actual work himself, but he does work exclusively with our men in the property department.

The War Labor Board then referred the case to the American Federation of Labor, because it was a jurisdictional dispute between two A. F. of L. unions. The convention was in New Orleans at that time, and we sat with President Green and President Linlauf of the Decorators and Paper Hangers of America, and we tried to adjust it. However, we could reach no agreement. We insisted upon those men working in that department coming into the I.A.T.S.E., and working under the jurisdiction of the I.A.T.S.E. The case went back to mediation again in Los Angeles, and I assigned Roy M. Brewer out there to see if he could do anything on the case, but he was unsuccessful. [69]

The War Labor Board then said they would take jurisdiction of the case back from the American Federation of Labor, and they would appoint an arbitrator to decide the case. We were not ready for compulsory arbitration, and I don't think the labor movement at that time was ready for compulsory arbitration, and after you have heard Joe Keenan talk this morning, I don't think we are ready for compulsory arbitration yet.

We so told the War Labor Board, and we told them that we thought the jurisdiction of this case belonged to the National Labor Relations Board, and that they should find out who would be designated as the bargaining agent.

Now, the War Labor Board saw fit to override all of our objections. They sent their arbitrator in there to

decide the case. Mr. Tong came from the Northwest. Since then I have learned that he came from the lumber industry, which is very closely allied with the Carpenters & Joiners of America. He came in and held hearings at which time we refused to participate, at least we refused to participate only to the extent of objecting, telling them that they did not have the right to decide this case.

However, he handed down an award. He said that the contract of Local 1421 should be adhered to until such time as the National Labor Relations Board could decide the case, or until such time as there was an appeal giving us the right to appeal the case, and we did appeal the case.

The producers naturally, at that time, were in the middle. It was a fight between us and this other labor organization. They then went to the National Labor Relations Board, and asked that somebody designate who they should do business with, so that they could do it. And I will say one thing for the National Labor relations Board on this case. It moved faster than any time that I know of, because in seven days, I believe, the hearings were in progress.

The Painters and Decorators put their case on first, and they took all week to do it. They adjourned on Saturday, March 9, I believe it was, and we were to go on Monday morning and present the case of the I.A.T.S.E. Only one side had been in by this time, and they saw fit, Monday morning, to declare the disastrous strike in Hollywood, March 12. Now, at that time, the war was on. At that time every organization in the studios, through their International Union, had agreed to be bound by a no strike pledge. Motion pictures were just as much a part of this war, as the making of airplanes were. But they saw fit to break that no-strike pledge.

I assigned Roy M. Brewer to go out there as my representative and see if we could adjust it. He arrived there on the morning of the strike, and I arrived there on the 14th, a couple of days later. I want to tell you Delegates to this Convention, that on the 14th of March, this I.A.T.S.E. was down on its knees in Hollywood. We were practically counted out. [70] Only for the work that was done by your International Representatives, and International Vice-Presidents and myself, we wouldn't be discussing this issue at this convention, because we were out of the studios then.

However, we did go to each and every local union out there, to their meetings, to their executive boards, and asked them to go back into the studios, to carry on our no-strike pledge, to see that the films which had been doing such a fine job over on Okinawa and the other places, that we continue to make them.

I will say that the vast majority, and I mean vast majority of our members out there, did go back to work, and they put their shoulder to the wheel, and really gave it a good, honest push.

We then tried to get the other people back to work, telling them of their no-strike pledge. I called every International President that I could locate, and I told them, "If you have any jurisdictional dispute, if you have any fight with the I.A.T.S.E., let the people go back to work and let us sit down and try and adjust it." I called a man who is now dead, Ed Florey of the Hotel and Restaurant Workers, and said, "You are a member of the Executive Council of the American Federation of Labor. Do you think it is right that you or your people not to go through an unauthorized picket line?"

“Do you think it is right to break your no-strike pledge? I sat in a room with you and the entire Executive Council when we took that pledge, when we went over—at least the Executive Council went over to President Roosevelt and told him that if this legislation that you have before the Congress is not passed, we will agree to a no-strike pledge while the war is on.”

I said, “Do you mean to tell me that you, a member of the Executive Council, are going to break that pledge? Do you know what this fight is all about out here?”

He said, “All I know is that Bill Hutchinson called me up and told me the basic agreement and asked our support.” I said, “Are you sure that Hutchinson did that?” He said, “Yes, I talked to him.” I said, “Ed, you had better take a good look at this out here because it is going to get pretty nasty. The American Federation of Labor is against it. The War Labor Board is against it. They have all gone back to work and you refused to go. I think you should investigate it and see if you cannot get your people back to work.”

He promised me that he could. I am happy to say that the next day or two days later, that they were back to work, back on the job. I then called Bill Hutchinson back. He was down in the Carpenter’s Home in Lakeland, Florida. I said, “Bill, Ed Florey has told me that you told him that this is the basic agreement on him. Is that a fact?” He said, “I did not say it just that way.” I said, “Is it a basic agreement or argument [71] against the I.A.T.S.E., or is it a jurisdictional dispute?” He said, “I am not too familiar with it. Our man out there is handling it and I will have him get in touch with you and see if it can be adjusted.” I said, “I am willing to adjust it. See if your man can get in touch with me.”

I tried to get in touch with Ed Brown of the Electrical Workers, but he was away. I called the Washington office of the Electrical Workers and told them that I would even talk to the clerk there. I didn't even get the clerk. So as it developed, it proved to me that there was more behind this issue than 77 set decorators which the strike was called for.

I did not stop. I sat down with Cambiano, who is the representative of the United Brotherhood of Carpenters on the West Coast and I tried to adjust it. Their demands were terrific. The Committee of the Local Union that sat with me will bear that out, if there is any doubt. We sat for hours trying to iron it out. They would not do it.

I got in touch with the Plumbers' International President. He told me he would assign one of his men out there to sit down and see if we could adjust it. I sat down with them. We could not adjust it because they wanted jurisdiction which they never had before.

The producers then said to me, "Will you go and talk to Bill Hutchinson, because if you will do that I am sure that it will be adjusted in five minutes?" I said, "Yes, I will go and talk with Bill Hutchinson. Where is he?" He said, "He is in Lakeland, Florida. We will charter a plane for you to fly down there." I said, "I will go anyplace to talk with him."

So they chartered a plane, and then it turned out that a couple of representatives of Bill Hutchinson from Hollywood had to go down there, and it turned out that one of the representatives could not or would not fly. So it kept postponing and postponing. You will have to know that at the time we are talking about the war was on;

there was a shortage of manpower, and everybody was looking for every individual who could do anything in this country at that time.

So they were postponing it. The studio was not moving too fast at this time. There were not too many people working in them. So I said, "We will go by train; we will drive there." I got the information that Hutchinson had to go to New York. "Would I go to New York?" "Yes, I would go to New York."

So we got on a train and we went to New York, and I sat down with Hutchinson and some of his official family. I took along a representative of our property-men's local with me, and we tried, at this meeting, to adjust our differences of jurisdiction. They had pictures that they brought—maybe eight by ten—which would be a picture of a set. And Hutchinson would take this picture and say, "Whose jurisdiction does that belong in?"

So, let's say the picture was of a western street scene, and up over the bar was the big sign advertising the bar and advertising the pawn [72] shop and so on up and down this western street scene. He said, "Who builds that?" "You build it, Hutch." I said, "It belongs to you." "O.K., no dispute on that. We will accept that."

They came out with a picture that had a bar in a corner of a hall like this. "Who builds that bar? Is there a dispute?" "You build it. It is yours." We have a picture of an old fashioned house with an elevator structure that runs up and down, as some of you people have seen it, between the stairs. "Who builds that?" "You build it."

Then we would come to tables and chair. He said, "Who builds them?" "They are props," I said. "We

build them." They laid that one aside. There was a dispute.

We went on for about four hours like that, with various pictures given. They were taken someplace. And I thought we were going along and doing pretty good. I made a suggestion to Hutch; I said, "We don't need the employer there"; because at that time Mr. Nick Schenck was sitting there, Casey was sitting there and Joe Vogel was there. So I thought we could get along better if the employer was not there. So I said, "Let's you and I come back with the committee tomorrow morning and sit down and see if we cannot adjust all the differences." He agreed.

We came back the next morning and went over some more pictures and gave some more jurisdiction away, and gave so much jurisdiction away that the representative of Local 44 was squirming in his chair, and you from Hollywood know that Cappy DuVal does not give anything away if he can help it.

We continued to adjust because I knew how serious this was and I wanted the men back in the studios. I knew if they went back we would do the job much more easily. It went on for another two hours or so, and then Hutchinson made his mistake. He leaned back in the chair and he said, "We want all wood work, all wood working machinery, and all work on wood and wood substituted."

It covers a lot of territory. If this microphone were to be built out of wood, it would mean that our property men who normally build this would not be permitted to do that. So I turned to Hutchinson and said, "Hutch, you get nothing!" I said, "Now if you want to settle along the lines that we have been talking about, I am

willing to do that. I make this suggestion to you: We have agreed on certain jurisdiction which belongs to you and certain jurisdiction which belongs to the I.A.T.S.E. I suggest that any jurisdiction that is in dispute that we send it back to Hollywood and that we let the Local Unions out there appoint committees and let them sit down among themselves and try to adjust any jurisdiction which we have not been able to agree upon. If they cannot adjust it within 30 days, then you and I sit down and we agree to adjust it." [73]

He said, "No, I want all wood, wood substitutes and all wood working machinery."

I thought that we had leaned back a long, long way in that meeting, and I did not want it to break up, so I said, "We agreed with the employer that if we could not come to an agreement that we call them back into the picture and see if they could help us out." So we asked Nick Schenck, Casey and Vogel to come back in again and we told them what we had done.

Mr. Schenck, who is a good friend of Hutchinson's, said, "Hutch, do you mean to tell me that you sit there like a man of iron and that you would not bend one way or the other? Do you realize that our studios out there are practically closed? Do you realize that we have enough pictures on the shelf to run the theatres of this country for pretty near a year? But there is one thing that disturbs me and it should disturb you. And," he said, "that is that we are only six weeks ahead of the boys on the other side. That every picture that we make is put on 16 mm film and sent over to the boys on the other side.

"I am not patriotic or I am not a great patriot. I don't believe that I am worried about them. But I have

some people in there that I like very much. It is not business interests with me." He said, "It is the same interest that you and every other American should have. Do you mean to tell me that you are going to let these studios stay closed and that those pictures will be stopped from going to the other side?"

Hutchinson said, "I cannot do anything about it. I must take my jurisdiction and I must get what is mine."

Schenck turned to him and said, "Hutch, we have been friends for many years. I have done business with you for a long, long time. You have never come to me and asked for anything which I did not try to give you. And this is the first time that I have asked you for anything and you have turned me down." And he said, "It is not pleasing." He said, "Now we are going to run those studios, whether your men come back in there or not. Now, will you send your men back in?" And Hutch said, "No."

The meeting broke up and as I walked down Broadway with Nick Schenck, he said, "Can you run the studios?" I said, "Well, we will make an honest effort to do it. There are some 4,000 people out. There is no loose manpower laying around." But I said, "We must keep our theatres operating. If the studios shut down our theatres shut down because it is the source from which they feed. We will run the studios, but only on the one condition that you have no contracts whatever with any of the people who are out on strike. I think that you should go back to Hollywood again and give them the chance to come back to work if they want to come back. [74] And then if you see fit to cancel the contracts with these organizations that you have, then we will attempt to supply men, and not until then."

We went back to Hollywood. There were telegrams sent to every organization. There were letters sent to the individuals and they were asked that they come back and go to work, and they refused. Now you will have to understand that the case was before the National Labor Relations Board, and that both sides had agreed to be bound by the decision—that is the final decision of the National Labor Relations Board. That was already agreed to. So that the argument so far as the set decorators were concerned was practically wiped out.

They cancelled all the contracts, all the local unions that were out; because every local union had violated its contract. Every local union had agreements with the employer and with this International Union as to how they should handle jurisdictional disputes, and as to what conditions they had the right to go out on strike on. They violated every one of them. They violated the mandate of the American Federation of Labor when Bill Green asked them to go back to work. They violated the War Labor Board when they told them to go back to work. They told everyone where to go and they told them they would close the studio up until they got what they demanded; and they were demanding that all the jurisdiction be amended—the electricians, the carpenters, everybody, not just the set decorators.

So we started to try and supply help to the studios. I think we did a pretty good job. The studios opened up. They were running. Our members were going through the picket lines—not that they wanted to go through. I don't think any labor man wants to go through a picket line; but he has the right to decide whether a picket line is a picket line or not. And this picket line was wholly unauthorized by anyone.

This continued. We kept working in the studios. Then I was summoned to the Executive Board in Washington, D. C.—the Executive Board of the American Federation of Labor. I went down to the Executive Board of the American Federation of Labor in Washington, D. C. I argued the case out before them. I showed them what we were trying to do, and I believe they agreed with us. I showed them that the Painters and Decorators of America had taken into their jurisdiction not alone set decorators, but screen story analysts, set designers, office employees, screen publicists—they had everything in there whether they had any connection with a painter or not.

Their excuse for the screen publicists was that they paint a picture to the public with words. (Laughter) And that went on with the other crafts just the same way.

The Executive Council of the American Federation of Labor ordered us to cease and desist in what we were doing. Well, we were not just [75] too anxious to cease and desist because we thought that we were right. We had issued charters out there to the Carpenters and Painters, and we issued them because some of our local unions would not cooperate to the extent of taking in enough members to cover the jurisdiction which we thought belonged to them. I went to the Juicers, 728 and I said, "Here is the jurisdiction over all electrical equipment, for which you have been crying for years. Take these people in and organize them. Run the studio." They did not see fit to do it.

We went to the Laboratory Technicians and said, "In New York, the maintenance of machines is done by the laboratory technicians of New York, and they have them so specified in their contract." I said, "Here is a good

chance for us to clean up that controversy out here." We don't want to take any machinists' jurisdiction; but it is a question of whether they have taken our jurisdiction, coming in with a can and claiming that they must oil the machinery and adjust it and so forth. We thought we had a lot of technicians qualified to do the job. The laboratory technicians did not see fit to do it.

I found out that in the studios, that the Machinists were going up in our motion picture booths, and taking care of the motion picture machines. If there was a sprocket to be replaced, they replaced it. If the machine had to be adjusted, they adjusted it. We stopped that, and I will say this much: That the operators out there did cooperate, some reluctantly, but after the case was explained to them, they did a pretty fair job on it.

We had to issue charters to take care of the work which nobody would take over out there. So, in issuing the charters, we got in trouble with the American Federation of Labor. I was asked if I would attend a meeting in Chicago, with the Building Tradesmen, and I said, "Yes, we will go there."

We went there. Hutchinson was again presiding at this meeting. He had presided in Washington, by the way, and he was presiding at this one. We went in there and had quite a discussion. We tried and tried hard to adjust it, and I asked them all, I said, "Please go back to work in the studios. Take up where you left off, and we will adjust everything." They said, "No. Everybody that you put in there on the job must get off the job before we will step into the studios."

Well now, there have been many promises made out in Hollywood, and many promises broken. I had made

a promise to all the people who went into the studios who helped us to fight, that we would not desert them when the time came for adjustment, if there was to be any adjustment. So that meeting broke up because I would not take all the people out of the studios and put all their people back in. And I may call your attention to the fact that in the settlement of the strike in 1933, we had to take into the I.A.T.S.E. everybody who carried an I.B.W. card, a United [76] Brotherhood card, and everybody went in there and took our jobs when we went out. But they were not willing to agree to that.

So that meeting ended. The Executive Council of the American Federation of Labor met in the city of Chicago, and they ordered us there, because of the fact that we had not complied with their mandate to cease and desist what we were doing in Hollywood. And we went into the Council of the American Federation of Labor, and we must have put up a pretty good argument, because they didn't throw us out, as everybody said they were going to do—throw us out of the American Federation of Labor. All of the Hollywood sheets had funny pictures of Walsh going out the window, and Walsh going out the door. Walsh of course, was your International President. But they didn't throw us out. They again told us to withdraw the charter of the Carpenter and the Painter, and any other charters that we had illegally issued.

I called an executive board meeting of your Executive Board, and we decided to comply with that. But before that was done, the Executive Council had ordered that we sit in Washington, D. C., as a committee, and see if we couldn't adjust our differences. So we went to Washington, D. C., and we sat for three days. President

Green presided over the meeting, and did a pretty fine job. The meeting was almost ready to break up, and I suggested because President Green was over at the White House, that we wait until he came back, and give him the right to sit there when we broke up, or at least give him the right to try and adjust it. When he came back, we sat for some more hours, and we reached this agreement.

I haven't got it here. I thought I had it in my pocket. We reached the agreement that we would send the case back to Hollywood, and see if it could be adjusted out there by local committees sitting, and adjust the differences. That was to be done within thirty days. We sent it back there, and the committees didn't even get together. The mass picketing job started, and you know what happened I think, from the papers. We were wrong again, by the way. Our men went to work that morning. There were close to a thousand pickets on Warner Brothers Studio, and as three automobiles came up filled with I.A. men, to go to work, they were turned over. Now, it is a cinch they didn't turn themselves over. Somebody must have pushed them, and a little fight started. We decided that we were going to work in the studios. Some of our local unions out there of the I.A.T.S.E. decided that we were wrong. However, the loyal members of the I.A., and there were many of them out there, on the next morning, or the morning after, decided that they were going to go through that line and go to work.

When they got through, some of our fellows were laying down; and some of theirs. But, they went to work.

Now, it is pretty tough that you have to go to work that way; and [77] it wasn't good for the industry that

we make a living from. A new man at this time stepped into the picture. The man was Eric Johnston. He will be here this afternoon to address the convention.

He called upon me in the city of New York and asked me if I would come out to Hollywood and sit down and see if we couldn't adjust this strike because it wasn't doing any good for anybody. And I agreed with him.

I didn't know Eric Johnston from the man in the moon. I had never met him. I might say that I tried to find out just who he was and what his connection was because I had been talking to the producers and I had understandings with the producers as to how the work should be carried on in the studios, so I was wondering what this new element was that was coming in.

I told him I didn't think that I could get transportation out there; it was tied up pretty well. He said, "Don't worry about that. A man will be over in your office with a ticket on the United Airlines at one o'clock." So at one o'clock I was on a plane, on my way back to Hollywood. He out-manuevered me!

I went out there and sat down with him and tried to adjust it with him. He sat with the committee from our side, and he sat with a committee from the other side, and made every effort possible to see if it couldn't be adjusted. Finally, after several days' meeting, he said it was the most complicated thing that he ever ran up against and he didn't know how it was going to be adjusted. He even asked me if I would sit down with Sorrell and talk to him, and I even agreed to that. But it didn't do any good.

So Johnstone was at the wit's end. The Council of the American Federation of Labor was meeting in Cincinnati

at that time. Now you can imagine how long this thing has been going on that I am talking about because the Council has already met three times, this is the third time, and they weren't just meeting on this question; they were meeting as a regular order of business.

So he said, "Will you go to Cincinnati with me and see if we can adjust this in Cincinnati?" I said, "Yes, I will go to Cincinnati with you."

We flew into Cincinnati and appeared before the executive council of the American Federation of Labor again. By this time they were getting used to looking at me.

It was argued pro and con. The producers put their side of the case in; the representatives of the other International Unions put their side of the case in; and I voiced the side of the I.A.T.S.E. before the executive council again. One of the members of the Council said, "We have listened to this case now several times and we have issued many orders, but it [78] doesn't look like it has stopped the strike in Hollywood. I move you, Mr. Chairman, that we go into executive session and consider this."

So we were all asked to leave. But Hutchinson, he was on the executive council, stayed. I was out in the hall. I don't know what went on there, but after we were called back, the Council of the American Federation of Labor did something that I never knew of before: They directed that the strike be terminated.

Now, you must understand that there was no I.A.T.S.E. men on strike. We were in the studios working. So I was in a very funny position. What was I going to object to? I had no men out on strike, but here was a directive from the American Federation of Labor which was go-

ing to affect me. If I disobeyed the American Federation of Labor's directive, and it was the first one of this kind that they had ever made, I had only one thing to do: to take this I.A.T.S.E. out of the American Federation of Labor.

I assure you it was a pretty tough decision to make, but that is what you have an International president for. I had to sit in there and make that decision in a very, very few moments.

I made it. I kept you in the American Federation of Labor. I said, "The I.A.T.S.E. will obey your directive. All I want to know is, what is it?"

I still have the sheet of paper in my pocket from the meeting. Some day I am going to frame it because I think it is worth it. It says, "No. 1, the Council directs that the Hollywood strike be terminated immediately."

Everybody in Hollywood said that the strike would only be terminated by the local unions in Hollywood and by nobody else. That was one of the things that made me agree. I thought that the parent body of the American Federation of Labor was doing a fine job when they took it upon themselves to terminate that strike. I thought that that is where it should have been done—at the head, as they did it.

"No. 2, That all employees return to work immediately.

"No. 3, That for a period of 30 days the International Unions affected make every attempt to settle the jurisdictional question involved in the dispute.

"No. 4, That after the expiration of 30 days, a committee of three members of the executive council of the American Federation of Labor shall investigate and de-

termine within 30 days all jurisdictional questions still involved.

“No. 5, That all parties concerned, the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada; the United Brotherhood of Carpenters and Joiners of America; the International Association of Machinists; the United Association of Plumbers and Steamfitters of the United States and Canada; the Brotherhood of Painters, Decorators and Paperhangers of America; [79] the International Brotherhood of Electrical Workers; and the Building Service Employes International Union, accept as final and binding such decisions and determinations as the executive council’s committee of three may finally render.”

That was some directive! To us, anyhow. We were supposed to be the culprits, and we threw on the table the entire jurisdiction of the I.A.T.S.E. in the West Coast studios. These three men had the right to take from us anything that belonged to us, and I agreed to be bound by it for you. To say that I was not worried would be fooling myself. Any time that you do that, it is a dangerous chance.

On this committee that was appointed by the Council was a barber, a mailman, and a trainman. Everybody said, “What do they know about the studios?” I said, “Just about as much as anybody else does; and that is nothing.”

They said, “This barber has a jurisdictional dispute with you in Hollywood. He wants the makeup artists.” I said, “A friend of mine on the Council told me that this is the fairest committee that could be picked by the Council, and I am taking his word for it, and I am willing

to take our chances with him." Because when Dan told me, "Dick, go along," I took Old Dan's advice.

Now, they were supposed to have the committees try and adjust it out there. I think one or two sat. The rest of them weren't interested; they were back working. Our men who had taken their place were sitting down idly. There arose another dispute, and that was that the Council of the American Federation of Labor had said that if the employer wanted to use the I.A.T.S.E. men, he couldn't do it.

I said, "No, the Council didn't say that." So they threatened to go out on strike again if they used any I.A.T.S.E. men. They had them out, and they were going to keep them out.

We had to fly back to Washington again to get an interpretation from the American Federation of Labor as to whether they had the right to do it or not. We got this interpretation: "It is definitely and clearly understood that all striking employees in Hollywood who were on call on March 12th shall return to work immediately. Each employee will return to the position he formerly occupied when the strike occurred. Management shall exercise its usual prerogative as to the assignment of employees who in the 60-day interim period, without interference on the part of the unions involved . . ."

They bore out my contention that if the employer wanted to hire the I.A.T.S.E. men during the 60-day interim period, he could do it. But, the employers weren't so anxious to do it. They were afraid of another strike. So they paid our men to sit around for 60 days.

Now, you will have to understand that at this time the machinists [80] were out of the American Federation of

Labor because they wanted to get out, because they didn't pay their per capita tax. The committee came out there, after the local unions had tried to settle it, and I again went back to Hollywood to try and protect the jurisdiction of I.A.T.S.E.

I sat with the jurisdictional committee, with committees from each and every local union involved. I think that if there happens to be any dispute that the committees who sat there in the room with the "three wise men," as they have been called, will agree that we put up a pretty stiff fight. We have the minutes of it.

This committee held these hearings in a funny way. The first thing I did was to get into an argument with the committee because I didn't know what the other men had said, the Brotherhood of Painters and the Carpenters, and so forth. So I said, "By the way, what other issues are there besides jurisdiction? I don't know what the other locals are claiming."

The committee said, "We were sent out here to decide this, not you, and we are going to run it the way we want to run it. Now if you don't like it, you know what you can do."

Well, I thought it best that we accept their decision and put our faith in them, and we did. At the meeting it was decided that the committee would go to the studios and look over the jurisdiction in the studio, and that they would let one representative from each union involved go through the studios with the committee—one representative. The other side had five, and all the locals that belonged to the I.A.T.S.E. had one. So it behooved us to out-talk the five.

I accepted the assignment myself, and went through the studios with the committee. I assure you if you have never been in the studios that it is not an easy thing to argue that all of this work which we were claiming belonged to us. In this studio that we went to, there was a large hall, let's say, or studio stage like this. On that side was the carpenter shop, and they had band saws, table saws, planers, and so forth. On this side was the property shop. They had band saws, table saws, planers, and so forth. On that side they were cutting up certain size lumber and working on it; and on this side they were cutting up certain size lumber and working on it.

So the committee walked in, and they said, "Walsh, tell us the difference." (Laughter) I tried, and when I looked at their faces, I didn't think too much of what was going to happen.

But we were building props over here, and I showed them what props were. I told them what I thought our jurisdiction was as far as special effects were concerned. A man working on a bench with a special effect had a Stilson wrench, couplings, had fittings, had pipe, and he was putting them together. [81]

So the Committee walked over and said, "What local do you belong to?" He said, "I belong to 44, the property men." So the plumbers' representative said, "Take a look at what he is doing." (Laughter) And they did.

We went all through the studio and went through each and every department. We went to the sound department, which is a very important department in the studios, and there were three men working there. So they went to them and said, "What local do you belong to?" He said, "I belong to the I.A.T.S.E., Sound Local." "What

local do you belong to?" "I belong to Local 40 of the I.B.E.W." So here are two men working on the same job, doing the work, and they were at least getting along together, and that impresses me. (Laughter) The mere fact that two rival unions could work together was really wonderful.

As we walked through one of the streets of the studio, a very nice looking young lady came by, and Sorrell—called her by name and said—"Come over here. I want to introduce you to the Committee. This is one of our set decorators." I don't know whether it was planted or not, because any time you are working for a good-looking woman, you have the advantage. Some of our property men know that. (Laughter)

However we went into the studio on a set, and lo and behold, this young lady came out, and she was the set decorator, working on that set. So the Committee asked her what she did. So she started to explain that she goes over to the warehouse and she has the property boys pick out the furniture that she calls for, and then she has the property boys bring the furniture over to this set, and then she has the property boys place the furniture where she tells them, and then she has the property boys hang the pictures where she tells them, and the property boys do everything for her. I thought that I should introduce myself to the young lady about that time, and I told her, so that she would know who she was talking to, that I was the President of the I.A.T.S.E., and I didn't want to take any advantage of her, so she would tell the story and tell it right, because she was doing a pretty good job for us at that time.

Well, she continued on, because she had no other story to tell but that one. So the Committee asked me if I had

anything to say about it, and I said, "No, the young lady is doing a good job for us. If you think we are right, you can so decide."

Then another peculiar thing happened. We went into the Paramount restaurant there. They have restaurants on all these lots. They are very fine, well equipped, and all of us, the committee and the opposing side, sat down to break bread. It was so good that they came to take our picture, because they didn't ever think they would get us all together in one room. (Laughter)

We came on back, after going through the studio and sat down again [82] to present the final part of our case, and we argued with this committee about the erection of sets, and brought pictures to show them the sets we were talking about. We told them about our jurisdiction on the stages, in the theaters, and how the motion picture had migrated from the theater to the motion picture studio, that it was no more than taking a show and putting it onto a stage in a motion picture studio, and then photographing it. We evidently must have put up a good argument, because after the decision was handed down by this committee, that work was assigned to us.

Now, I explained the peculiar way that this committee handled it, and I didn't have too much faith in the committee. When I left Hollywood after the hearings, I thought that we were going to lose everything in Hollywood. But when the decision was handed down, I found out that we lost the set decorators. They gave them to the painters and paperhangers. I found out that we lost some jurisdiction as far as wind machines were concerned, to the electrical department. I found out that they gave to the plumbers, many things which the plumbers

didn't have before. I found out that they gave to the Building Service Employees—and the Building Service Employees by the way, have only gone into the studio since 1942—but they gave them policemen, watchmen, and certain men on the stages, certain men in the lots. They even wanted to come into the dressing rooms, which the property men were taking care of for years, and take over the work in the dressing rooms which they were doing. However, the Committee decided against them on that. But they did give to the Building Service Employees more jurisdiction than they did have before, and they gave to the Electrical Workers more jurisdiction than they had before, and they gave to the plumbers, more jurisdiction than they had before. They went down to the Carpenters, and they decided that an agreement which was drawn up in 1926, setting forth the barriers, classifications of work which was to be done by the I.A.T.S.E. and the Brotherhood of Carpenters—now, you must understand that this agreement was not drawn up by the International Unions. It was drawn up by committees out there from the local unions, working in Hollywood, and that was the agreement that we were working under until 1933, when we went out on strike to support the sound men.

So this committee, in its judgment, saw fit to put that agreement back into effect, and they so ordered. That gave us the erection of sets, it gave us the making of props, it gave us the making of miniatures; it gave to the Carpenter, all the mill work, it gave to the Carpenter all mill and trim work on the sets after we erected them.

Now, as I read here, this decision was to be final and binding upon all the parties who agreed to it, and one of the parties was the Brotherhood of Carpenters and Join-

ers of America and a member of the Council of the [83] American Federation of Labor. When it was put into effect, the Brotherhood of Carpenters and Joiners refused to abide by it. They claimed that the committee did not go to Indianapolis to see Mr. Hutchinson, and Mr. Hutchinson wouldn't agree to it for that reason.

I again had to go out to Hollywood, because the fire was all started again, and they needed the firemen. The Council of the American Federation of Labor was meeting in Miami this time. Hutchinson threatened to withdraw from the American Federation of Labor if he was made to obey this decision. Eric Johnston was in New York but he called me in Hollywood. He said, "Dick, what are we going to do about it?" I said, "All I want anybody to do is to agree to be bound by the decision, to be bound by it."

Now, everybody shouts about arbitration. If this wasn't arbitration, I don't know what you would call it. If we put up on the table the jurisdiction of the I.A.T.S.E., and let them come up anyway they wanted to, and we agreed to be bound by it, and Hutchinson wouldn't, what good is arbitration anyway, if you can't enforce it.

I said, "The I.A.T.S.E. will not change, and has no right to change one word in that decision. We don't like the jurisdiction that we lost. We don't like the trouble that we had to go through, but we are bound by it, and we are going to live up to our agreement, and I want Hutchinson to do the same thing."

President Green sent me a wire, and asked if I would come to Miami to see the Council. I told him, "Yes, I would." We went to Miami, and I tell you that the Council was in bad condition at this time, because, here is the largest organization in the American Federation of Labor threatening to leave because of some 2,000 carpenters in Hollywood. It wasn't an easy fight to step into. The employer was also there.

Eric Johnston had come down, and we sat around in various meetings, trying to find some way to get around it.

But we could reach no agreement whereby we would not break the decision of these three men. Now, I did not think that when the Council issued this directive and said that it was to be final and binding upon all parties concerned, that I should override that Committee or that anybody else should. We went before the Council and I so argued the case before them again. They took out—at least Hutchinson took out—an agreement which had been drawn up with Local 80 of the Grips, which they had agreed to through their representative and I had sat there while the agreement was drawn up and made; and I would have signed it as the International President of the Alliance, but the Carpenters representatives refused to sign it. He said, "The only one that could sign that was the chief—that is Hutchinson. He said, "Will you live up to this agreement, Walsh?" [84]

I said, "For your information, the I.A.T.S.E. lives up to all its agreements. Yes, we will live up to that agreement." He said, "Oh, the argument is all over. There

is nothing else to it." I said, "Oh, no. The Grips don't do that work." He said, "What?" I said, "The Grips don't do that work." Our studio mechanics out there do the set erecting. So, if you think by only negotiating one agreement in Hollywood that you out-brained us, you did not, because that work was assigned to the I.A.T.S.E. by the jurisdictional Committee, not to Local 80 or any individual Local, in the I.A.T.S.E. And the Council agreed that that was right, and that we had the right to put that work where we desired.

We sat down with Hutchinson that afternoon and tried to see if we could not reach an agreement, and we were unsuccessful because he was uncompromising. He then introduced to the Council a resolution that they set aside the decision of the three wise men, and that they put the 1921 agreement back in full force and effect.

Well, I don't know for sure, but I got the inside dope that they had only one vote on the Council on that, and that was his own, so they asked him to withdraw it which he did; and the Council, I am proud to say, stood behind the three men that they sent to Hollywood, and they said, "Enforce the directive."

To this day the Carpenters have refused to live up to it.

The machinists, in the meantime, were out of the American Federation of Labor. We requested the American Federation of Labor to give us jurisdiction over the machinists who were working in the studios at the time

of the strike, and who were doing work on sets and props and so forth.

Now, you understand, that the studios are all A. F. of L. The American Federation of Labor didn't see fit to give us the charter. We requested it, but they didn't see fit to do it. However, they did think that if a federal charter was asked for, that that would be issued.

The federal charter was asked for and received, and the only A. F. of L. Union of Machinists in Hollywood or in Los Angeles today is that federal charter. All of the men who belong to the I.A.T.S.E., technician's local, joined them.

We went to the studios and we said, "Now, we don't want to have the A. F. of L. lose its hold on the studios by reason of one of these organizations coming in here and breaking down our conditions. We want you to employ A. F. of L. people." You understand that nobody must be stopped, whether they belong to the machinists' organization or any other organization, from joining this A. F. of L. Union.

So a dispute arose over the machinists and they threatened to call another strike if the studios were to put A. F. of L. machinists to work. They have supported an affiliate of an independent union now on the [85] second occasion. The first occasion was the screen extras. They supported the screen players, which was not affiliated with the American Federation of Labor in any way, and refused to support the screen extras who were affiliated

with the American Federation of Labor. Now they come back and refused to support the machinists, who are affiliated with the American Federation of Labor, and that caused some more trouble out there.

Now, the I.A.T.S.E. and myself, as your representative, have carried on this fight that I have explained to you. It has not been an easy one, but we carried it on to protect the jurisdiction of the I.A.T.S.E. Not one I.A.T.S.E. member has lost a day's work in Hollywood because of the trouble. Any man who wanted to go to work could go to work, and didn't lose a day's work. We will lose if this is lost out there because, I understand, Hutchinson is appealing this again to the next Council meeting, and has refused to be bound by it.

Now, I carried on the fight for the last year or more. I have tried to do the best I could for you. I have tried to protect your jurisdiction, which they took away from you, not once, but twice, and probably three times. Up to now, we have won.

I now place in the hands of this convention the Hollywood situation. I, as your International President, request of you to protect further the source of supply from our Hollywood studios so that you, the stage employees, the moving picture machine operators, the laboratory technicians, and all affiliates, will not be stopped because of the source of supply being cut off. It is in your hands.

* * * * *

[Endorsed]: Filed Jan. 13, 1947. [86]

[Title of District Court and Cause]

NOTICE OF MOTION TO DISMISS AND FOR A
MORE DEFINITE STATEMENT

To Plaintiffs and to Their Attorneys Zach Lamar Cobb
and Bates Booth:

Please Take Notice that on Monday, January 27, 1947, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, in the Court Room of Honorable Ben Harrison, Judge of the above entitled Court, in the United States Post Office and Court House Building, Los Angeles, California, defendants Association of Motion Picture Producers, Inc., Loew's Incorporated, Paramount Pictures, Inc., Warner Bros. Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Production, Inc., Republic Productions, Inc., Hal Roach Studios, Inc., Twentieth [97] Century Fox Film Corporation, RKO Radio Pictures, Inc., Univesal Pictures Company, Inc., and Technicolor Motion Picture Corporation, will move the above entitled Court as follows:

1. To dismiss the First Cause of Action of Plaintiff's Complaint upon the ground that the Court lacks jurisdiction over the subject matter.

2. To dismiss the Second Cause of Action of Plaintiff's Complaint upon the ground that the Court lacks jurisdiction over the subject matter.

3. To dismiss the First Cause of Action of Plaintiff's Complaint upon the ground that said cause of action fails to state a claim against said defendants upon which relief can be granted.

4. To dismiss the Second Cause of Action of Plaintiff's Complaint upon the ground that said cause of action

fails to state a claim against said defendants upon which relief can be granted.

5. For a more definite statement with respect to the following matters which are not averred with sufficient definiteness or particularity to enable said defendants properly to prepare their responsive pleading.

(a) Whether defendant "United Brotherhood of Carpenters and Joiners of America" is intended to be the International Union or Local No. 946 of the International Union, it appearing from the title of the cause and Paragraph IV of the First Cause of Action that plaintiffs intend that the International Union shall be the party defendant, but it appearing from Paragraphs I and XXI of the First Cause of Action that plaintiffs intend that Local 946 of the International Union shall be the party defendant, and it being uncertain in other paragraphs which entity is [98] intended to be the party defendant.

(b) By which of the respective defendant Motion Picture Companies it is claimed that the respective plaintiffs were employed "since the beginning of the making of motion pictures in the Southern District of California," as alleged in Paragraph XIII of the First Cause of Action, and by which of said defendants it is claimed that the respective plaintiffs are now employed.

(c) What was the term and what were the provisions of the agreement that it is alleged in Paragraph XIX of the First Cause of Action was "reached" by said defendants and defendants IATSE and Carpenters Union, which is referred to throughout the balance of the First Cause of Action as "the Cincinnati agreement."

(d) What obligation it is claimed that defendants breached in discharging "approximately 500 members of the Carpenters Union from their employ," and in replacing them with members and permittees of Set Erectors Local No. 468 of defendant IATSE, so as to make such discharge and replacement wrongful as alleged in Paragraph XXV of the First Cause of Action.

(e) What provision of what agreement it is claimed that said defendants breached in discharging approximately 1200 carpenters from employment and employing members and permittees of defendant IATSE, as alleged in Paragraph XXVI of the First Cause of Action.

(f) Whether it is claimed that plaintiffs and other members of the Carpenters Union were on strike against said defendants between March 12, 1945 and November 1, 1945, when it is alleged in Paragraph V of the Second Cause of Action that said defendants employed "strike-breakers to do carpenter work in [99] place of members of said Carpenters Union."

Said motion will be based upon the files and records of the above entitled action and upon the Memorandum of Points and Authorities filed concurrently herewith.

Dated January 13, 1947.

O'MELVENY & MYERS and
HOMER I. MITCHELL
Attorneys for Said Defendants

[Endorsed]: Filed Jan. 13, 1947. [100]

[Title of District Court and Cause]

MEMORANDUM OPINION

This action for a declaratory judgment is brought by sixteen individuals, members of the United Brotherhood of Carpenters and Joiners of America (hereinafter called Carpenters), on behalf of themselves and others similarly situated, to determine and to protect against alleged conspiracy their rights under certain agreements entered into between the motion picture studios, Carpenters, the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada (hereinafter called Stagehands), and others. The defendant studios and Stagehands have moved to dismiss on the grounds that: (1) this court lacks jurisdiction; (2) the court should, in the proper exercise of its discretion, decline to assume jurisdiction; and (3) the complaint fails to state a claim upon which relief can be granted. [101]

The forty-eight page complaint when analyzed presents nothing more or less than a request that this court interpret a private contract or agreement allocating certain work on stage sets in the moving picture industry. As stated by counsel in oral argument, the difference between the parties is simply who is "to drive the nails." The serious question before the court is whether this court has jurisdiction in the absence of diversity of citizenship.

Thus, we have an action in which private individuals ask this court to construe their rights under a contract negotiated on their behalf by a labor union, and to protect such rights from interference with or invasion by

other persons acting individually or in conspiracy with each other. Since this is a court of limited jurisdiction, every case brought here must fall within the terms of a provision of some statute of the United States. Plaintiffs allege (paragraph VIII):

“Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code Annotated; Section 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV.”

If the case does not fall within the terms of one or more of these statutes or amendments to the Constitution, the court must dismiss the action for want of jurisdiction.

28 United States Code Annotated 41(12) and 8 United States Code Annotated 47(3) give the District Courts jurisdiction in suits for damages on-account of injury to the plaintiff's person or property, or the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of a conspiracy. Under 28 United States Code Annotated 41(12), damages are an essential part of the judgment, and damages will vary from person to person. Their rights are several, and a judgment in this action will not bind the parties not before the court. *Pentland vs. Dravo Corp.*, 3 Cir., 152 F. (2d) 851; [102] *Bethlehem Shipbuilding Corp. v. Nylander*, 14 Fed. Supp. 201. The decision here would not settle the entire controversy, and where that cannot be done, a complaint seeking a declaratory judgment should

be dismissed. *Angell v. Schram*, 6 Cir., 109 F. (2d) 380, 382; *United Electrical R. & M. W. v. Westinghouse Electric Corp.*, 65 Fed. Supp. 420, 423; *Koon v. Bottolfsen*, 60 Fed. Supp. 316.

Disregarding the limitations of said section on account of the requirement of damages, this court would still be without jurisdiction, since these statutes were passed to protect individuals from violations of their rights by State action, and none is here alleged. *Love v. Chandler*, 8 Cir., 124 F. (2d) 785, 786-7. Only rights of citizens under the laws of the United States are protected. *Mitchell v. Greenough*, 9 Cir., 100 F. (2d) 184, cert. denied 306 U. S. 659, 83 L. Ed. 1056, 59 S. Ct. 788. That being true, since more than Three Thousand Dollars is admittedly involved, this section can in no event confer any jurisdiction not already given by 28 U. S. C. A. 41(1), which is hereinafter discussed.

28 U. S. C. A. 41(1) and 8 U. S. C. A. 43 both provide for redress for deprivation of rights under color of any law, statute, ordinance, regulation, custom, or usage of any State or Territory, in express terms. It is not alleged that the defendants are acting under color of any State law, etc. so these sections cannot act to establish jurisdiction in this court. *Allen v. Corsane*, 56 Fed. Supp. 169; *California Oil & Gas Co. v. Miller*, 96 Fed. 12, 22; *Picking v. Pennsylvania R. R.*, 151 F. (2d) 240, is not applicable here, because the wrongs alleged in that case were all under color of State law.

28 U. S. C. A. 729 merely establishes the procedure to be followed by the federal courts in certain classes of cases. This section has reference not to the extent or scope of jurisdiction, nor to the rules of decision, but to the forms of procedures and remedy. In *re Stupp*, 23 Fed. Cas. No. 13,563; *United States v. Reid*, 12 How. 361, 365, 53 U. S. 361, 365, 13 L. Ed. 1023, 1025; *Scaffidi v. United States*, [103] 1 Circ., 37 F. (2d) 203, 207.

The Fifth and Fourteenth Amendments of the Constitution are designed to protect the individual from invasion of his rights, privileges and immunities by the federal and the State governments respectively. *Corrigan v. Buckley*, 271 U. S. 323, 330, 70 L. Ed. 969, 46 S. Ct. 521; *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 969, 46 S. Ct. 521; neither *Hague v. C. I. O.*, 307 U. S. 496, 83 L. Ed. 1385, 59 S. Ct. 972, 122 A. L. R. 695, nor *Screws v. United States*, 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 162 A. L. R. 1330, has overruled these cases, even by implication, for the wrongs complained of in both the *Hague* and the *Screws* cases were committed by the government or under color of law.

28 U. S. C. A. 41(8) confers jurisdiction on the District Courts of the United States in "all suits and proceedings arising under any law regulating commerce." without regard to the jurisdictional amount requirement of 28 U. S. C. A. 41(1). Since more than Three Thousand Dollars is involved in this action, Section 41(8) will not establish jurisdiction in this court if it cannot be es-

established under Section 41(1), which grants jurisdiction in all suits where the matter in controversy exceeds Three Thousand Dollars and "arises under the Constitution or laws of the United States."

It is not enough that the dispute should merely affect commerce to bring it within the scope of Section 41(8) or Section 41(1). *Delaware, Lackawanna & Western R. R. v. Slocum*, 56 Fed. Supp. 634.

In *Gully v. First National Bank*, 299 U. S. 109, 81 L. Ed. 70, 57 S. Ct. 96, Mr. Justice Cardozo said, at page 112:

"To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. * * * The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." [104]

Plaintiffs do not claim any violation of the right to bargain collectively under the National Labor Relations Act, 29 U. S. C. A. 157, nor the right to contract for employment, nor the right to contract collectively for employment. Plaintiffs assert that the right to work at one's chosen vocation within the terms of a contract negotiated under federal law, the National Labor Relations Act, has been violated. The bare right to work is not a right protected by federal law. *Love v. United States*, 8 Cir.,

108 F. (2d) 43, cert. denied 309 U. S. 673, 84 L. Ed. 1018, 60 S. Ct. 716, and cases therein cited; *Brents v. Stone*, 60 Fed. Supp. 80, 84; *Emmons v. Smitt*, 58 Fed. Supp. 869, affirmed 6 Cir., 149 F. (2d) 869, 872.

From the mere fact that a right was established by federal law, it does not follow that all litigation growing therefrom arises under the laws of the United States. Actions growing from the issue of federal land grants do not arise "under the laws of the United States." *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864, 20 S. Ct. 726; *Shulthis v. McDougal*, 225 U. S. 561, 569, 56 L. Ed. 1205, 32 S. Ct. 704, 707; *Marshall v. Desert Properties*, 9 Cir., 103 F. (2d) 551, cert. denied 308 U. S. 563, 84 L. Ed. 473, 60 S. Ct. 74. An action brought to enforce a right under a contract which is made as the result of rights granted under the patent laws to receive royalties upon sale or license of the patented device is not an action arising under the laws of the United States. *Odell v. Farnsworth*, 250 U. S. 501, 504, 63 L. Ed. 1111, 39 S. Ct. 516. To come within the provisions of these sections, the suit must really and substantially involve a dispute respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. *Malone v. Gardner*, 4 Cir., 62 F. (2d) 15; *Delaware Lackawanna & Western R. R. v. Slocum*, 56 Fed. Supp. 634.

The only important issue in the case at bar is the interpretation of a contract. The meaning of this contract

is not dependent on the National Labor Relations Act, whether it owes its existence to [105] that Act or not. A decision by this court that the Carpenters or the Stagehands, as the case may be, have the right to construct stage sets would not involve consideration of the validity, construction, or effect of the Act. The decision would be based purely and simply upon contractual principles. Therefore, this suit does not arise under the Constitution or laws of the United States, and this court lacks jurisdiction.

In this memorandum opinion, this court has not attempted to cover the broad field of law cited in over two hundred and twenty-five cases referred to in the two hundred pages of briefs. To do so would require the writing of a treatise on various phases of the subject of jurisdiction of the United States District Courts in labor disputes.

I have only attempted to outline my reasons for my conclusion that this court lacks jurisdiction. In view of my conclusion, it is unnecessary to pass upon the other questions raised by the various motions.

The above entitled action is hereby ordered dismissed for want of jurisdiction.

Dated: This 25 day of Feby., 1947.

BEN HARRISON

Judge

[Endorsed]: Filed Feb. 26, 1947. [106]

In the District Court of the United States
Southern District of California
Central Division

No. 6063-BH

OSCAR SCHATTE, et al.,

Plaintiffs,

vs.

ALLIANCE
THE INTERNATIONAL ~~ASSOCIATION~~ OF THE-
ATRICAL STAGE EMPLOYEES AND MOV-
ING PICTURE OPERATORS OF THE UNITED
STATES AND CANADA, et al.,

Defendants.

JUDGMENT OF DISMISSAL FOR LACK OF
JURISDICTION

The motions of certain defendants for the dismissal of the above entitled action for lack of jurisdiction of this court having heretofore been submitted to this court for determination, and it appearing that this court lacks jurisdiction to proceed in said action:

It is therefore ordered, adjudged and decreed that the above entitled action be and is hereby dismissed for lack of jurisdiction.

Dated: This 25 day of February, 1947.

BEN HARRISON

Judge

Judgment entered Feb. 26, 1947. Docketed Feb. 26, 1947. C. O. Book 41, page 805. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed]: Filed Feb. 26, 1947. [107]

[Title of District Court and Cause]

NOTICE OF APPEAL [108]

Notice Is Hereby Given that the plaintiffs in the above entitled action do on behalf of themselves and all others similarly situated and each of said plaintiffs does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment of Dismissal for Lack of Jurisdiction given and made in the above entitled action in favor of defendants and against plaintiffs herein and entered February 26, 1947 in Civil Order Book 41, page 85, and from the whole and every part of said Judgment.

Dated: May 20th, 1947.

BATES BOOTH
ZACH LAMAR COBB and
BATES BOOTH

Attorneys for Plaintiffs

[Endorsed]: Filed May 20, 1947 & Mld. 2 copies
Harry N. Routzohn & Bodkin, Breslin & Luddy. [109]

[Title of District Court and Cause]

COST BOND ON APPEAL

Know All Men by These Presents, that National Automobile & Casualty Insurance Co., a corporation duly organized and doing business under and by virtue of the laws of the State of California and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, is held and firmly bound unto defendants The International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Loew's Incorporated, Paramount Pictures, Inc., Warner Brothers Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Technicolor Motion Picture Corporation, Twentieth Century Fox Film Corporation, R. K. O. Radio Pictures, [110] Inc., Universal Pictures Company, Inc., and Association of Motion Picture Producers, Inc., as appellees, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to said defendants, as appellees, The International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Loew's Incorporated, Paramount Pictures, Inc., Warner Brothers Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Technicolor Motion Picture Corporation, Twentieth Century Fox Film Corporation,

R. K. O. Radio Pictures, Inc., Universal Pictures Company, Inc., and Association of Motion Picture Producers, Inc., their heirs and assigns, for which payment well and truly to be made the National Automobile & Casualty Insurance Co. binds itself, its successors and assigns firmly by these presents.

Signed, sealed and dated this 5th day of June, 1947.

The condition of the above obligation is such, that Whereas, Oscar Schatte, Raymond E. Conaway, Andrew M. Anderson, Charles L. Davis, Harry Beal, Arthur Djerf, Ewald K. Albrecht, Harry L. Talley, Harry Davidson, John L. Kierstead, Thomas W. Hill, Lloyd C. Jackson, Alfred J. Withers, John H. Zell and Edward Derham, plaintiffs and appellants in the above entitled suit, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a judgment made, rendered and entered on the 26th day of February, 1947, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause, granting judgment, on motion of defendants and appellees, for the dismissal of said cause for want of jurisdiction, as in said judgment set forth.

Now, Therefore, the condition of the above obligation is such that if the said Oscar Schatte, Raymond E. Conaway, Andrew M. Anderson, Charles L. Davis, Harry Beal, Arthur Djerf, Ewald K. [111] Albrecht, Harry L. Talley, Harry Davidson, John L. Kierstead, Thomas W. Hill, Lloyd C. Jackson, Alfred J. Withers, John H. Zell, and Edward Derham shall prosecute their said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their ap-

peal, then this obligation shall be void; otherwise to remain in full force and effect.

NATIONAL AUTOMOBILE & CASUALTY
INSURANCE CO.

(Seal) By Fred W. Weitzel
(Fred W. Weitzel, Attorney in Fact)
Attorney in Fact and Agent [112]

State of California
County of Los Angeles—ss.

On this 5th day of June, 1947, before me, the undersigned, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Fred W. Weitzel, known to me to be the Attorney-in-Fact and the Agent of the National Automobile & Casualty Co., the corporation that executed the within instrument, and acknowledged to me that he subscribed the name of the National Automobile & Casualty Co. thereto and his own name as Attorney-in-Fact and Agent.

(Seal) LORAINÉ G. WINSTON
Notary Public in and for the County of Los Angeles,
State of California
My Commission expires July 4, 1949.

Examined and recommended for approval as provided in Rule 8.

ZACH LAMAR COBB
Attorney for Plaintiffs

I hereby approve the foregoing.

Dated: this 6 day of June, 1947.

BEN HARRISON
U. S. District Judge

[Endorsed]: Filed Jun. 6, 1947. [113]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 115 inclusive contain full, true and correct copies of Amended Complaint for Declaratory Relief; Appearance and Non-Resistance of Judgment by United Brotherhood of Carpenters & Joiners of America; Motions by Defendants International Alliance, etc., et al. to Dismiss; Notice of Motion and Motion to Dismiss and for a More Definite Statement by Defendants Association of Motion Picture Producers, Inc., et al.; Memorandum Opinion: Judgment of Dismissal for Lack of Jurisdiction; Notice of Appeal; Cost Bond on Appeal and Stipulation Designating Documents for Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk.

By Theodore Hocke,
Chief Deputy Clerk.

[Endorsed]: No. 11653. United States Circuit Court of Appeals for the Ninth Circuit. Oscar Schatte, Raymond E. Conaway, Andrew M. Anderson, Charles L. Davis, Harry Beal, Arthur Djerf, Edward K. Albrecht, Harry L. Talley, Harry Davidson, John L. Kierstead, Thomas W. Hill, Lloyd C. Jackson, Alfred J. Withers, John H. Zell and Edward Derham, on Behalf of Themselves and All Others Similarly Situated, Appellants, vs. International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, et al., Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 13, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11653

OSCAR SCHATTE, et al.,

Appellants,

vs.

THE INTERNATIONAL ALLIANCE OF THEAT-
RICAL STAGE EMPLOYEES AND MOVING
PICTURE OPERATORS OF THE UNITED
STATES AND CANADA, et al.,

Appellees.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON APPEAL

Appellants make the following statement of the points upon which they intend to rely upon this appeal.

1. The court erred in its judgment dismissing this action for lack of jurisdiction, for the reason that the court had jurisdiction under Section 400, Title 28, United States Code Annotated; Sections 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and each of them; and the Constitution of the United States, Amendments V and XIV.

2. The court erred in its judgment dismissing this action for lack of jurisdiction, for the reason that this

suit is of a civil nature which arises under the Constitution and Laws of the United States, particularly under the Act of Congress of July 5, 1935, commonly referred to as the National Labor Relations Act, and the laws of the United States relating to interstate commerce, and was instituted pursuant to the provisions of said National Labor Relations Act, and laws of the United States relating to interstate commerce, and also under the general equity jurisdiction of the court.

Appellants will also ask consideration of the provisions of the Labor Management Relations Act of 1947, in the event it shall have become law pending appeal.

Dated: This 10th day of June, 1947.

ZACH LAMAR COBB

Attorney for Appellants

Service acknowledged this 10th day of June, 1947: Bodkin, Breslin & Luddy, by Peter E. Giannini, Attorneys for Appellees, I.A.T.S.E. and Roy M. Brewer. O'Melveny & Myers, By Marjorie McCoy, Attorneys for Appellees, Companies and Association.

[Endorsed]: Filed Jun. 13, 1947. Paul P. O'Brien, Clerk.

No. 11653.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANTS.

ZACH LAMAR COBB,
929 Citizens National Bank Building, Los Angeles 13,
Attorney for Appellants.

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FILED IN UNITED STATES BANK



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The court has jurisdiction because the conspiracy of the appellees herein, for the appellee motion picture companies, and association, to employ non-union permittees, designated by IATSE, in a quasi open shop operation, and in substitution for Carpenters under their collective bargaining contract, constitutes an attack upon, and an attempt to nullify, the National Labor Relations Act.....	51
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No. 11653.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANTS.

Jurisdictional Statement.

The pleadings, facts and statutes which confer original jurisdiction upon the District Court of the United States and appellate jurisdiction upon this Court are as follows:

(1) Statutes Conferring Jurisdiction on the United States District Court (U. S. C. A., Title 28) :

“Section 400. (Judicial Code, section 274d.)
Declaratory judgments authorized; procedure.

“(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United

States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

“Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

“(1) United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interests and costs, the sum or value of \$3,000, and (a) arises under the Constitution or laws of the United States, * * *”

“(8) Suits for violation of interstate commerce laws. Eighth. Of all suits and proceedings arising under any law regulating commerce. (Mar. 3, 1911, c. 231, §24, par. 8, 36 Stat. 1092; Oct. 22, 1913, c. 32, 38 Stat. 219.)”

“(12) Suits concerning civil rights. Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8. (R. S. §563, par. 11; §629, par. 17; Mar. 3, 1911, c. 231, §24, par. 12, 36 Stat. 1092.)”

“(14) Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. (R. S., §563, par. 12; §629, par. 16; Mar. 3, 1911, c. 231; §24, par. 14, 36 Stat. 1092.)”

“Section 729. Proceedings in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of chapter 3 of Title 8, and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R. S., §722.)”

U. S. C. A., Title 8:

“Section 43. Civil action for deprivation of rights.

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. (R. S., §1979.)”

“Section 47. Conspiracy to interfere with civil rights.

“(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of

damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R. S., §1980.)”

U. S. C. A., Title 29:

“Section 157. Right of employees as to organization, collective bargaining, etc.

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. July 5, 1935, c. 372, §7, 49 Stat. 452.”

Constitution, Amendment V:

“No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *”

Constitution, Amendment XIV:

“Section 1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; * * *”

The Labor-Management Relations Act of 1947:

“Section 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

Statement of the Case.

The memorandum opinion of the District Court directing that plaintiffs' action be "dismissed for want of jurisdiction," because there was no diversity of citizenship [R. 122], is reported in 70 F. S. Adv. 1008, and printed in full in the appendix hereto [*infra* 8].

In this memorandum opinion the court gave the following general statement of plaintiffs' complaint:

"This action for a declaratory judgment is brought by sixteen individuals, members of the United Brotherhood of Carpenters and Joiners of America (hereinafter called Carpenters), on behalf of themselves and others similarly situated, to determine and to protect against alleged conspiracy their rights under certain agreements entered into between the motion picture studios, Carpenters, the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada (hereinafter called Stagehands), and others." [R. 122].

The Complaint.

The complaint is referred to in its entirety [R. 2], including its exhibits, because it is all material to the issue of jurisdiction. It is summarized as follows:

The Parties.

The complaint alleges the common concern and interest of all members of the Carpenters Union in the contracts alleged, and that the suit is brought in their behalf as a class [II; R. 4]; that the International Association of Theatre Studio Employees, hereinafter referred to as "IATSE", is a labor union, comprising certain local unions

of persons employed by the defendant Motion Picture Companies, and that Richard F. Walsh, International President of IATSE, and Roy M. Brewer, its International Representative, were its agents [III; R. 4]; that the defendant, United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as "Carpenters Union", is a labor union comprising local unions, particularly Local 946, engaged in performing work for said picture companies; that William L. Hutcheson is its National President, and James Skelton is the business agent of said local [IV; R. 5]; that Conference of Studio Unions was an organization of local unions of various crafts comprising members employed by the motion picture industry, including said Local 946, and that Herbert K. Sorrell was President of said Conference of Studio Unions and agent for its member unions [V; R. 5]; that the various defendant Motion Picture Companies, hereinafter referred to as "Motion Picture Companies", are engaged in the business of making pictures, etc., and that the defendant Association of Motion Picture Producers, Inc., hereinafter referred to as "Producers Association", is a corporation created and maintained by the said companies as their agent in all matters alleged herein [VI; R. 5-6].

Jurisdiction.

The said complaint further alleges that the jurisdiction of this Court is vested by virtue of 28 U. S. C. A. 400, 41 (1), 41 (8), 41 (12) and 41 (14) and 729; 8 U. S. C. A. 43 and 47 (3); 29 U. S. C. A. 157; and the Constitution, Amendments V and XIV; "and that the matter in controversy herein, being the right to work for wages, exceeds the value of three thousand dollars (\$3,000.00), exclusive of costs and interest, as to each plaintiff herein, and arises under the Constitution and laws of the United States; and that the acts and conduct of defendants alleged herein has subjected and continues to subject plaintiffs to deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States and with the object of injuring plaintiffs in their persons and property in having and exercising said rights and privileges as citizens of the United States" [VIII, IX, X; R. 7].

Bargaining Agents.

The complaint further alleges that the defendant Carpenters Union is, under the provisions of the National Labor Relations Act, the legally constituted bargaining agent of carpenters employed by defendant Motion Picture Companies; that the defendant IATSE is the legally constituted bargaining agent of stagehands employed by defendant Motion Picture Companies; and that "Both said defendant unions are affiliated with and subdivisions of the parent union organization, the American Federation of Labor" [XI; R. 7-8].

The Controversy.

The complaint further alleges that the controversy involves the allocation of labor to be performed for defendant Motion Picture Companies by members or respective defendant unions, the Carpenters and IATSE, under the terms and provisions of contracts entered into and executed by and with said company defendants and defendant Producers Association, and under the agreements and decisions, findings and awards arrived at pursuant to said arbitration agreements; and that the controversy alleged is not a "labor dispute" over conflicting claims to bargaining rights or any other such issue within the scope of the National Labor Relations Act, defendant unions being recognized by all defendants herein as the legally constituted collective bargaining representatives of their respective members; and that the Labor Board has no jurisdiction either to interpret and adjudicate the terms of said contracts, findings, decisions, and arbitration awards, or to hold hearings and render judgment on the type, class, and nature of services to be rendered by members or respective defendant unions; and that said contracts, decisions, findings, and awards in arbitration involve rights and privileges secured to plaintiffs by the Constitution and laws of the United States [XII; R. 8-9].

To obtain a full determination of the controversy so alleged plaintiffs made all parties concerned defendants in this case, including their own union, The United Brotherhood of Carpenters, etc., and its Local Number 946.

Carpenters Historic Right to Carpenters Work.

The complaint further alleges that since the beginning of the making of motion pictures in the Southern District of California, and until events related hereinafter, plaintiffs and the class for which they sue have been employed by defendant Motion Picture Companies under the terms of succeeding contracts for the performance of any and all carpenter work in connection with the making of motion pictures, including the construction of all sets and stages, platforms, buildings, and parts of buildings, the operation of all wood working machinery and tools, the making of all furniture and wood fixtures, the performing of all trim and mill work, the erection, modeling and remodeling, destruction and dismantling of all scaffolds, platforms, frames, buildings and streets, and the performance of all labor involving the use of carpenter tools [XIII; R. 9].

Contract Between Carpenters and Companies. Exhibit "A."

The complaint further alleges a basic agreement between the defendant Motion Picture Companies and plaintiffs' Carpenters Union, covering rates of pay, tenure, seniority, vacations, and other terms and conditions of employment, and giving members of said Carpenters Union the exclusive right to do any and all carpenters work for said companies; that said agreement was executed on or about November 29, 1926, and has been continued in effect between the parties, with periodic adjustments, supplements and amendments, up to the present time, and that the current contract, referred to as the Beverly Hills interim agreement of July 2, 1946, is attached to the complaint as Exhibit "A" [XIV; R. 9-10, 28-34].

Contracts Between Carpenters and IATSE.
Exhibit "B."

The complaint further alleges that beginning in 1921, and continuing until the present time, the Carpenters Union and the IATSE engaged in a series of negotiations between themselves, and with the defendant Motion Picture Companies, and entered into arbitration before the American Federation of Labor, with the view to settling existing disputes and controversies, and that these negotiations have resulted in a series of agreements, decisions, and awards, constituting a fair and practical division of motion picture employment between the Carpenters Unions and IATSE [XV; R. 10].

The complaint further alleges that the first agreement, made on July 9, 1921, under the auspices of Samuel Gompers, attached as Exhibit "B," recited among other things, that "all carpenter work in and around motion picture studios belongs to the carpenters" [XVI, R. 10-37]; that the second agreement, made on February 5, 1925, attached as Exhibit "B" classified the following work as belonging to the carpenters: all trim and mill work on sets and stages; all mill work and carpenter work in connection with studios; all work in carpenter shops; all permanent construction; and all construction work on exterior sets; and as belonging to the IATSE: miniature sets; property building; erection of sets on stages except as above provided; wrecking all sets, exterior and interior; and erecting platforms for lamp operators and camera men on stages [XVII; R. 11-35].

Agreement to Arbitrate.

The complaint further alleges a meeting in Cincinnati from October 20-25, 1945, of the Executive Council of the A. F. of L. and agents and representatives of the defendant Motion Picture Companies, defendant Producers Association, IATSE and Carpenters Union, where they, including all the appellees here, entered into an agreement, hereinafter referred to as the Cincinnati Agreement, whereby the Council directed that the Hollywood strike be terminated, that all employees return to their work immediately, that they attempt to settle their difficulties, and that a committee of three members of the Executive Council of the A. F. of L. investigate and determine "all jurisdictional questions still involved"; and that the said unions "accept as final and binding such decisions and determinations as the Executive Council Committee of Three may finally render." That in compliance therewith, it was agreed between the defendant companies, and Association, and the Carpenters Union, that pending the said arbitration, the carpenters would return to work for, and be reemployed by, the defendant Motion Picture Companies in accordance with said Exhibit "A" contract, and that the IATSE members and permittees be withdrawn, and that the carpenters did so return to work on or about November 1, 1945 [XIX, XX; R. 12-13].

**Contract Between Carpenters and IATSE Grips.
Exhibit "C."**

The complaint further alleges that in pursuance of said Cincinnati Agreement, the Grips' Local 80 of the IATSE, and the Carpenters Local 946, made an agreement on November 13, 1945, attached as Exhibit "C," whereby as stated in the contract, the carpenters would have jurisdiction over all temporary and permanent building construction work, and maintenance, covering any building done for the purpose of photographing; the installing and handling of all hardware and glass; the complete building, erection, re-erection and remodelling of all sets, streets, parts of sets and retakes, including sufficient platforms for shooting same, but not including platforms used exclusively for the camera, lighting equipment and dolly tracks; sets used for process or trick photography to be considered the same as any other set; the building and manufacturing of all grip equipment which is made of wood or wood substitutes; all wood crating for shipping or storing; the operation of all woodworking machinery; the construction, remodelling and erection of all cut-outs, with the exception of fold and hold cut-outs; heavy construction on all wooden diffusing frames; the building or erection and dismantling of all scaffolds for construction, with the exception of tubular steel scaffolding; remodeling of all sets while shooting on studios or on location; the underpinning and construction of all platforms, with the exception of those used exclusively for camera, light and dolly track platforms; and that the grips should have jurisdiction over the handling of all sets and units from the mill to the stage, from stage to stage, from stage to scene dock, from scene dock to mill and from scene dock to stage; the handling and maintenance of all grip equip-

ment; the erection and handling of all fold and hold cut-outs; the construction, maintenance and handling of all diffusing frames, with the exception of heavy construction on wooden frames; the building, erection and dismantling of all tubular steel scaffolding, not to include underpinning, and the construction of platforms, including underpinning, for use exclusively by camera, light equipment, and for supporting dolly tracks; with the statement that this agreement was not intended by either party to reflect the full jurisdiction of these locals in the studios, but that it was intended to reflect the agreement reached between said Carpenters Local 946 and IATSE Grips Local 80 on the jurisdictional points at issue between them [XXI; R. 14, 39-41].

Arbitration, Decision and Award. Exhibit "D."

The complaint further alleges that pursuant to said Cincinnati agreement, said Committee of the Executive Council of the A. F. of L. rendered its decision and award on December 26, 1945, attached as Exhibit "D," allocating the following work to Carpenters: all trim and mill work on sets and stages; all mill work and carpenter work in connection with studios; all work in carpenter shops; all permanent construction; all construction work in exterior sets; and the following work to the IATSE: miniature sets; property building; erection of sets on stage except as above provided; wrecking all sets, exterior and interior; and erecting platforms for lamp operators and camera men on stages [XXIII; R. 14-16, 42].

IATSE Violation of Arbitration Award.

The complaint further alleges that with the design and purpose of violating and defeating the said Cincinnati Agreement decision and award, and in violation of said agreement of November 13, 1945, and earlier agreements, the IATSE, Walsh and Brewer, created its Set Erectors Local No. 468, and claimed for it the right to perform "set erection," meaning and intending to intrude upon the contract rights of said carpenters; and that thereafter, in January, 1946, defendant Motion Picture Companies wrongfully and without just cause discharged approximately 500 carpenters from their employ, and undertook to replace them, and to allocate their work to IATSE members of said Set Erectors Local No. 468, and to other persons not members of IATSE who were issued Permits to Work; and that thereafter said Motion Picture Companies have refused to employ plaintiffs, and the class for whom they sue, for the work prescribed by said contracts, decisions and awards, and have discharged approximately 1200 of them, and have engaged in their place IATSE members and permittees, under the form of Emergency Working Cards attached as Exhibit "E," containing the agreement between the IATSE and the permittee that "The undersigned will surrender this Emergency Working Card and the position held thereunder upon demand of Local 468. It is recognized that the issuance and acceptance of this Emergency Working Card does not entitle the undersigned to membership in Local 468 or to any rights against or within said Union." [XXIV, XXV, XXVI; R. 16-17, 56].

Clarification of Arbitration Award.

The complaint further alleges that taking cognizance of the controversy over the meaning of the words "erection of sets," in the Exhibit "D" decision and award, said Committee of the Executive Council reviewed its findings, and on August 16, 1946, issued its Clarification, attached as Exhibit "F," in part as follows:

"Jurisdiction over the erection of sets on stages was awarded to the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada under the provisions set forth in Section 8 of the decision which specifically excluded trim and mill work on said sets and stages. The word erection is construed to mean assemblage of such sets on stages or locations. It is to be clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction.

"Sections 2 to 5, inclusive, recognized the rightful jurisdiction of the United Brotherhood of Carpenters and Joiners of America on all mill work and carpenter work in connection with studios, all work in carpenter shops, all permanent construction and all construction work on exterior sets."

and that on September 21, 1946, William Green, President of the American Federation of Labor, wrote a letter, attached as Exhibit "G," to the Los Angeles Central Labor Council relative to the December 26, 1945 award, and clarification thereof, in part as follows:

"Be assured that we will do everything that lies within our power to bring about the acceptance of the decision made by the committee representing the Ex-

ecutive Council, and its clarification of its decision, both in spirit and in letter. All parties involved in the jurisdictional disputes agreed in advance of the decision of the committee to accept it and abide by it." [XXVII, XXVIII; R. 17-19, 57, 59].

Compliance With Arbitration Award and Clarification by Carpenters; Breach by IATSE.

The complaint further alleges that the contract of July 2, 1946, and the basic contracts which it supplements, as to rates of pay and terms and conditions of employment of plaintiffs by defendant Motion Pictures Companies, and the agreements, decisions, findings, and awards in arbitration arrived at and agreed to by all defendants herein, specifying and allocating the type, class, and nature of work to be performed and rendered respectively by plaintiffs and by members of defendant IATSE are now in full force and effect and binding on all defendants herein; and that the plaintiffs stand ready, willing, and able to perform the work awarded to them as aforesaid, and at the rates of pay, terms, and conditions of their aforesaid contract with defendants Motion Picture Companies and Producers Association [XXIX, XXX; R. 19]; but that the defendants, who are appellees herein, failed and refused, and still fail and refuse, to abide by and to perform on their parts the said contracts, decisions, findings, and awards in arbitration, and continue to follow a course of conduct and action in violation thereof [XXXI; R. 19-20].

IATSE Threats and Coercion.

The complaint further alleges that the controversy alleged herein arises from the acts and conduct of defendants IATSE, Walsh, and Brewer in claiming, demanding, and enforcing, by coercion and other devices, including the threat to close every motion picture theatre on the continent by calling out on strike all moving picture projectionists belonging to said union, their claim to the right to provide members of IATSE and non-union permittees of said union to do the work allocated to plaintiffs by the aforesaid decision and award and the clarification thereof, by historical custom and usage, and by the terms and provisions of agreements alleged hereinbefore, and the accession to said demands and the employment of members and "permittees" of IATSE to do the work of plaintiffs by defendant Motion Picture Companies [XXXII; R. 20].

Question Is of Public Interest.

The complaint further alleges that said controversy involves the construction and interpretation of the terms and provisions of the contracts, agreements, decisions, findings and awards alleged herein, and the rights, privileges, and immunities of plaintiffs thereunder and under the Constitution and laws of the United States; and that the controversy is actual and involves more than the rights of these plaintiffs and of the thousands of persons of the class for whom they sue but involves the rights of each and every party hereto; and, in addition to said individual rights, this controversy gravely and seriously involves the public interest; and that the declaratory relief sought herein is the only remedy available to plaintiffs

to maintain the Constitutional and legal right of these plaintiffs, and of their class, and all others involved directly or indirectly to work at their chosen vocations; the Constitutional and statutory right of plaintiffs to perform and of all other parties hereto to have performed that labor prescribed under the contracts, decisions, findings and awards alleged herein; the continued and uninterrupted production of motion pictures in said studios under the good faith observance of said contracts and arbitration determination; the continued and uninterrupted flow of interstate commerce in the motion picture industry under the good faith observance of said contracts and arbitration determination; and the maintenance of law and order in the City of Los Angeles and neighboring cities, in the County of Los Angeles, in the State of California, and in other states, under the observance of said contracts and arbitration determination, so as to bring an end to the state of emergency that has been declared by the public officials of the State of California and its subdivisions; and that a state of emergency exists; that this emergency is due to this controversy over rights secured by and flowing from the laws and Constitution of the United States, for which rights no relief or remedy is provided by law or equity except the order and judgment of this court as prayed; that a declaratory judgment of these rights by this court would bind all parties hereto and terminate the controversy and its attendant violence, chaos and disorder [XXXII, XXXIII, XXXIV, XXXV; R. 20-22].

The Conspiracy.

The Second Count of the complaint further alleges that the defendants, who are appellees herein, conspired each with the other, and continue so to conspire, to deprive plaintiffs of having and exercising, and to injure plaintiffs in their persons and property in the exercise of, rights, privileges, and immunities secured to plaintiffs by the Constitution and laws of the United States, in that said defendants conspired and continue to conspire each with the other to deprive plaintiffs of the right and privilege to work at their chosen vocations, to-wit: studio carpenters, and to interfere with, obstruct, impede, and hinder said plaintiffs in the free and unhampered exercise of said right and privilege; that said conspiracy has resulted and continues to result in great damages to plaintiffs in the loss of wages [II; R. 22-23]; and in furtherance of said conspiracy, on April 10, 1945, defendants Walsh and IATSE chartered a local union of IATSE, designating it Carpenters Local No. 787, for the purpose of providing strikebreakers through said charter to impede, interfere with, obstruct, hinder and defeat plaintiffs in the free exercise of the aforesaid rights and privileges, injuring plaintiffs in their persons and property and depriving plaintiffs of having and exercising their rights and privileges as citizens of the United States [III; R. 23]; and in furtherance of said conspiracy, and with the object of injuring plaintiffs in their persons and property and depriving plaintiffs of having and exercising their rights and privileges as citizens of the United States, on April

14, 1945, defendant Walsh directed a letter to members of the Carpenters Union, and other unions, attached as Exhibit "H," in part as follows:

"First of all, I want you to know that the International Alliance has reached an agreement with the Producers Association by which the I.A.T.S.E. will supply all labor to the studios, not only in our crafts which were recognized before the strike, but also in those classifications which have been vacated by the striking unions. The I.A. assumed this responsibility only after we were certain that it was impossible to reach an honorable settlement with those persons who are conducting this strike against the I.A.T.S.E.

"On Tuesday night of this week a Carpenter's Local was chartered and is now known as Local No. 787 of the I.A.T.S.E. On Thursday night, the Motion Picture Studio Painters, Local No. 788 of the I.A.T.S.E. was chartered. In addition to these Locals, there will be a local charter for Machinists, and if necessary for other crafts. We are proceeding in accordance with our agreement with the Producers to man the studios.

"As the International President of the I.A.T.S.E., I assure you that having assumed this jurisdiction, we will stake the entire strength of the International Alliance on our efforts to retain it."

[IV; R. 23-24]; and in furtherance of said conspiracy, and by "agreement with the Producers Association," and "proceeding in accordance with our agreement with the Producers to man the studios," as stated in the aforesaid letter of April 14, 1945, and with the object of injuring plaintiffs in their persons and property and depriving plaintiffs of having and exercising their rights and privileges as citi-

zens of the United States, defendants Walsh, Brewer and IATSE, did from March 12, 1945, and until on or about November 1, 1945, provide strikebreakers to defendant Motion Picture Companies, and said companies did wrongfully and without cause discharge members of Carpenters Union from their employment and did employ said strikebreakers to do carpenter work in the place of members of said Carpenters Union so discharged [V; R. 24-25]; and in furtherance of said conspiracy, defendants Walsh and IATSE did on or about November 1, 1945, create and charter Set Erectors Local No. 468 of defendant IATSE, and did issue "Emergency Working Cards" attached as Exhibit "E" and "Permits to Work" to persons not members of said union to perform carpenter services for defendant Motion Pictures Companies and said companies did discharge numerous members of Carpenters Union and did employ for said carpenter work persons so supplied to them by said Local No. 468 of defendant IATSE; that to date approximately twelve hundred of said Carpenters Union have been so discharged [VI; R. 25, 56]; and in furtherance of said conspiracy, defendant Walsh on August 31, 1946, directed a letter to defendant Producers Association, attached as Exhibit "I," in part as follows:

"It is the contention of this International Union that this so-called 'clarification' was issued without authority and in violation of the Cincinnati Agreement to which this International Alliance, yourselves, and the other International Unions involved, were all parties. The Cincinnati Agreement in making provision for the creation of the three man committee, specifically provided that the parties thereto accept the Committee's decision as final and binding." [VII, R. 25-26, 65];

and in furtherance of said conspiracy, defendant Walsh on September 13, 1946, directed a letter to local unions of defendant IATSE, attached as Exhibit "J," in part as follows:

"That no other organization shall be permitted, directly or indirectly, to infringe upon the jurisdiction of the I.A.T.S.E. or its Local Unions in the Hollywood Studios; and that the employment of the members thereof shall not be interfered with or adversely affected." [VIII; R. 26, 66-67.]

The Prayer.

The prayer in plaintiffs' complaint is for the following:

"I. That plaintiffs have the right and privilege as citizens of the United States to work at their chosen vocations free from deprivation or injury by defendants and each of them, acting individually or in conspiracy with each other, or by and through their agents or officers;

"II. That the Decision, Findings and Award of the Executive Committee of the American Federation of Labor of December 26, 1945, as clarified on August 16, 1946, is binding on all defendants herein;

"III. That plaintiffs have the right, free from deprivation or injury by defendants, and each of them, acting individually or in conspiracy with each other, or by and through agents or officers, to perform that work specified in the American Federation of Labor Decision, Findings, and Award of December 26, 1945, as clarified by the directive of August 16, 1946;

"IV. That the term 'erection of sets on stages' as used in said award does not include any 'set construction' but means 'assemblage of such sets on stages' as stated in the directive of August 16, 1946;

“V. That plaintiffs have the right to do any and all carpenter work in connection with the studios;

“VI. That the agreement of July 2, 1946, is binding on the defendants party thereto.

“VII. That plaintiffs have the right to work for defendant Motion Picture Companies under the rates of pay, terms, and conditions of the agreement of July 2, 1946, free from deprivation or injury by defendants and each of them, acting individually or in conspiracy with each other, or by their agents or officers.

“And such further relief as the Court deems proper.” [R. 26, 27.]

Appearance and Non-resistance of Judgment by United Brotherhood of Carpenters & Joiners of America.

“Comes now the United Brotherhood of Carpenters & Joiners of America, named as defendants herein and by its counsel enters its appearance herein as to both the original and amended complaints on file herein, and does not contest the granting of the prayer of plaintiffs’ amended complaint.

“Dated: This 8th day of January, 1947.” [R. 68.]

Appellees’ Motion to Dismiss.

The Court summarized these motions to dismiss, in said memorandum opinion, as follows:

“The defendant studios and Stagehands have moved to dismiss on the grounds that: (1) this court lacks jurisdiction; (2) the court should, in the proper exercise of its discretion, decline to assume jurisdiction; and (3) the complaint fails to state a claim upon which relief can be granted.” [R. 122.]

The Issue.

The Court stated the issue, in said memorandum opinion, as follows:

“* * * we have an action in which private individuals ask this court to construe their rights under a contract negotiated on their behalf by a labor union, and to protect such rights from interference with or invasion by other persons acting individually or in conspiracy with each other. Since this is a court of limited jurisdiction, every case brought here must fall within the terms of a provision of some statute of the United States. Plaintiffs allege (paragraph VIII):

“‘Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code, Annotated; Section 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code, Annotated; Section 729, Title 28, United States Code, Annotated; Sections 43 and 47(3), Title 8, United States Code, Annotated; Section 157, Title 29, United States Code, Annotated; and the Constitution of the United States, Amendments V and XIV.’

“If the case does not fall within the terms of one or more of these statutes or amendments to the Constitution, the court must dismiss the action for want of jurisdiction.” [R. 122-123.]

“Plaintiffs do not claim any violation of the right to bargain collectively under the National Labor Relations Act, 29 U. S. C. A. 157, nor the right to contract for employment, nor the right to contract collectively for employment. Plaintiffs assert that the right

to work at one's chosen vocation within the terms of a contract negotiated under federal law, the National Labor Relations Act, has been violated. The bare right to work is not a right protected by federal law." [R. 126.]

"From the mere fact that a right was established by federal law, it does not follow that all litigation growing therefrom arises under the laws of the United States." [R. 127.]

"To come within the provisions of these sections, the suit must really and substantially involve a dispute respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends." [R. 127.]

"The only important issue in the case at bar is the interpretation of a contract. The *meaning* of this contract is not dependent on the National Labor Relations Act, whether it owes its existence to the Act or not. A decision by this court that the Carpenters or the Stagehands, as the case may be, have the right to construct stage sets would not involve consideration of the validity, construction, or effect of the Act. The decision would be based purely and simply upon contractual principles. Therefore, this suit does not arise under the Constitution or laws of the United States, and this court lacks jurisdiction." [R. 127-128.]

"I have only attempted to outline my reasons for my conclusion that this court lacks jurisdiction. In view of my conclusion, it is unnecessary to pass upon the other questions raised by the various motions.

"The above entitled action is hereby ordered dismissed for want of jurisdiction." [R. 128.]

Judgment of Dismissal, Appeal Papers.

Judgment of Dismissal was dated on February 25, and entered February 26, 1947, as follows:

“The motion of certain defendants for the dismissal of the above entitled action for lack of jurisdiction of this court having heretofore been submitted to this court for determination, and it appearing that this court lacks jurisdiction to proceed in said action:

“It is therefore ordered, adjudged and decreed that the above entitled action be and is hereby dismissed for lack of jurisdiction.” [R. 129.]

The Notice of Appeal was given on May 20, 1947, as follows:

“Notice Is Hereby Given that the plaintiffs in the above entitled action do on behalf of themselves and all others similarly situated and each of said plaintiffs does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment of Dismissal for Lack of Jurisdiction given and made in the above entitled action in favor of defendants and against plaintiffs herein and entered February 26, 1947 in Civil Order Book 41, page 85, and from the whole and every part of said Judgment.” [R. 130.]

Cost bond on appeal was duly executed on June 5, 1947, and approved by the Court and filed on June 6, 1947 [R. 131-133].

Specifications of Errors Relied Upon by Appellants.

A statement of points on which appellants intend to rely on appeal, as next hereinafter set forth, was duly filed on June 10, 1947 [R. 136], as follows:

1. The Court erred in its judgment dismissing this action for lack of jurisdiction, for the reason that the Court had jurisdiction under Section 400, Title 28, United States Code, Annotated; Sections 41(1), 41(8), 41(12) and 41(14). Title 28, United States Code, Annotated; Section 729, Title 28; United States Code, Annotated; Sections 43 and 47(3), Title 8, United States Code, Annotated; Section 157, Title 29, United States Code, Annotated; and each of them; and the Constitution of the United States, Amendments V and XIV.

2. The Court erred in its judgment dismissing this action for lack of jurisdiction, for the reason that this suit is a civil nature which arises under the Constitution and laws of the United States, particularly under the Act of Congress of July 5, 1935, commonly referred to as the National Labor Relations Act, and the laws of the United States relating to interstate commerce, and was instituted pursuant to the provisions of said National Labor Relations Act, and laws of the United States relating to interstate commerce, and also under the general equity jurisdiction of the court.

Appellants will also ask consideration of the provisions of the Labor-Management Relations Act of 1947, in the event it shall have become law pending appeal.

ARGUMENT

This case, and appeal, deals with the human, property, constitutional and statutory right of the plaintiffs herein, and of each of the class for whom they sue, comprising all members of their Carpenters Union, Local 946, employed by the defendant Motion Picture Companies, to work under:

1. The collective bargaining contract negotiated and executed for them by said union, in accordance with the National Labor Relations Act, 29 U. S. C. A. 157 [*supra* 5, 8, 10; Ex. A, R. 28];

2. The contracts negotiated and executed for them by said union, in accordance with the National Labor Relations Act, with the defendant IATSE, in relation to said collective bargaining contract [*supra* 11; Ex. B and C, R. 10-11, 14, 35, 39]; and

3. The decision and award, and clarification thereof, made by the American Federation of Labor, pursuant to an arbitration agreement by said union with said IATSE, to which the defendant Motion Picture Companies, and Producers Association, were parties [*supra*, 12, 14, 16; Ex. D and G, R. 42-49].

The complaint further alleges the breach of said contracts, and arbitration award and clarification, by the appellees herein, and compliance therewith by plaintiffs, and the class for whom they sue (*supra* 15-17); the threats of the IATSE (*supra* 18); the conspiracy of the appellees herein (*supra* 20); that an actual controversy exists because thereof (*supra* 9); and that the question is of public interest (*supra* 18).

This suit for declaratory relief is based upon said actual controversy, that involves the interpretation of the terms and provisions of said contracts and arbitration awards, and clarification thereof, and the determination of the rights and obligations of each and all of the respective parties hereto thereunder. (*Supra* 23.)

Appellants, and the Class for Whom They Sue, Have a Constitutional Right to Work Under Their Lawful Collective Bargaining Contract of Employment With the Appellee Motion Picture Companies.

Nissen v. International Brotherhood of Teamsters, etc., et al., 229 Iowa 1028, 295 N. W. 858; 141 A. L. R. 598, at page 614:

“* * * Their membership rights and their rights under this contract with their employer were valuable property rights of which they were wrongfully deprived by the acts of the defendants. Such rights are guaranteed by the Fifth Amendment of the Federal Constitution. *Cameron v. International Alliance, etc.*, 118 N. J. Eq. 11, 176 A. 692, 696, 697, 97 A. L. R. 594. ‘There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.’”

Viewing the right to work in the above light, and in this respect for the dignity of labor, appellants will now respectfully submit, in appropriate order, that the Court has jurisdiction to render a declaratory judgment in this case because it arises under the Constitution and laws of the United States.

The Federal Declaratory Judgment Act Was Intended to, and Does, Provide a Remedy to Determine Rights and Obligations Under Contracts, Including Collective Bargaining Employment Contracts.

Peoples Bank v. Eccles, 64 F. Supp. 811, states the history and purpose of the Declaratory Judgment Act:

“The question presented on this motion to dismiss the complaint is whether a justiciable controversy is involved, which may form the basis for a declaratory judgment.” (p. 812.)

“The declaratory judgment procedure has been known in England for a great many years. In 1922, after its adoption by a number of States, the National Conference of Commissioners on Uniform State Laws drafted and recommended a uniform Declaratory Judgment Act, which has been enacted by a great many of the States. The Federal Declaratory Judgment Act became law in 1934. The report of the Senate Committee on the Judiciary, which recommended the passage of the legislation (S. Rept. No. 1005, 73d Cong., 2d Sess.) contains the following illuminating statements:

“The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one’s peril or to act on one’s own interpretation of his rights, or abandon one’s rights because of a fear of incurring damages. * * * In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one’s rights. * * * Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties.’”

It is requested that the Court note the language of the decision that the statute should be liberally construed:

“(3) The statute should be liberally construed, in accordance with the general canon of statutory construction applicable to remedial statutes. *Reliance Life Ins. Co. v. Burgess*, 8 Cir., 112 F. 2d 234; *Mississippi Power & Light Co. v. City of Jackson*, 5 Cir., 116 F. 2d 924; *Oil Workers Inter-Union v. Texoma Nat. Gas Co.*, 5 Cir., 146 F. 2d 62.

“One of the leading cases interpreting and applying the Federal statute is *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000, * * *”

Mississippi Power & Light Co. v. City of Jackson, et al., 116 F. 2d 924, at 925:

“The prayer was for a declaration that; ‘(a) Under its said contract, plaintiff has a right, * * *’”

“The city filed its motion to dismiss, asserting among other grounds (1) this court has no jurisdiction of the subject matter * * *”

“The district judge without an opinion, and without otherwise stating the reasons for his action, entered an order dismissing the cause for want of jurisdiction. Plaintiff is here challenging the order as entered erroneously, because its complaint showed the requisite diversity of citizenship and jurisdictional amount, and an actual controversy within the provisions of the Federal Declaratory Judgment Act. * * *”

“(2) While the declaratory judgment act has not added to the jurisdiction of the federal courts, it

has added a greatly valuable procedure of a highly remedial nature. Extending by its terms to all cases of actual controversy 'except with respect to Federal taxes,' it should be, it has been given a liberal construction and application to give it full effect * * *

And at 926:

"An authoritative determination as to the present status of the contract and of the rights and duties of the parties under it is essential in the interests of both city and company and of the public that both serve. For such a case, the declaratory judgment act is made to order. A large portion of appellee's brief is devoted to a discussion of the merits of the cause. Having been dismissed for want of jurisdiction, the merits of the cause are not before us. Neither, for the same reason, are we concerned with the question much discussed in the briefs of both appellant and appellee, with authorities pointing both ways, whether the declaratory judgment jurisdiction is discretionary that is, whether if the complaint makes out a case under the statute, the exercise of such jurisdiction, may in the court's discretion, be refused. The Court having dismissed the cause for 'lack of jurisdiction' because the court was of the opinion that 'it had no jurisdiction' of it, we are concerned here with questions neither of discretion nor of the merits, but only with whether there was jurisdiction and we think it plain that there was.

"No reason presents itself to us why the jurisdiction does not exist fully here. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings."

Oil Workers International Union, etc., v. Texoma Natural Gas Co., 146 F. (2d) 62, at 65:

“* * * The court below found that the controversy between the parties related to their legal rights and liabilities under their contract; that the parties had taken adverse positions with respect to their respective rights and obligations; that, therefore, a justiciable controversy existed, appropriate for judicial determination under the Declaratory Judgment Act. We agree. An employer may establish the seniority rights of an employee in dispute with other employees, as well as general rights which their contract relationship establishes, without waiting to be sued for breach or for damages or for specific performance, and thus secure an ‘interpretation of the contract during its actual operation’ and stabilize an ‘uncertain and disputed relation.’”

It is requested that the court note the language of the decision that it is not necessary to exhaust administrative remedies before bringing a declaratory action, as follows:

“Exhaustion of the administrative remedies granted by the War Labor Disputes Act, 50 U. S. C. A. Appendix §1501 *et seq.*, and Executive Order No. 9017, of January 12, 1942, 50 U. S. C. A. Appendix §1507, note, to employer and employee is not a prerequisite to the bringing of a court action by either party for an alleged violation by the other of a labor agreement.

“The judgment appealed from is correct. It is accordingly affirmed.”

Action for Declaratory Relief, Under State and Federal Acts, Is an Accepted Procedure in Controversies Arising Under Motion Picture Employment Contracts.

The Federal and California Declaratory Judgment Acts are substantially the same in terms.

28 U. S. C. A. 400 (*supra* 1);

Code of Civil Procedure of California.

“Art. 1060. (Declaratory relief.) Any person interested * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; * * *”

Columbia Pictures Corp. v. DeToth, 26 Cal. (2d) 753, 756:

“Plaintiff appeals from a judgment of dismissal entered upon sustaining defendant’s general and special demurrer to the complaint without leave to amend.

“In substance the pleading discloses the following: Plaintiff is seeking a declaration of the rights and duties of the parties under an unwritten contract of employment.” (pp. 756-757.)

“An actual controversy between the parties is asserted. Arbitration of the dispute by the Screen

Directors Guild was sought but its Conciliation Committee could not reach the required unanimous decision and made no findings.” (p. 758.)

“The prayer is for a decree fixing the rights and duties of the parties under the contract and renewal options as modified and extended, declaring it to be a valid and subsisting obligation, and granting such further relief as may be just and proper.” (p. 758.)

“(12) The remedies provided by the statute are cumulative and declaratory relief may be asked alone or with other relief (Code Civ. Proc., §§1060-1062).”

“(13) Testing the present pleading by the standards set forth in the cited cases, its allegations do not necessarily show that the remedy of declaratory relief may not have been better suited to plaintiff’s needs than the traditional remedies otherwise disclose. Furthermore, as stated in *Ermolieff v. R.K.O. Radio Pictures, supra* (19 Cal. 2d 543), at page 547, ‘Ordinarily, the alternative remedy, such as damages, injunctive relief and the like would be more harsh, and if he chooses the milder remedy, declaratory relief, the court is not required for that reason to compel him to seek a more stringent one.’ ” (p. 761.)

This case is also reported in 162 A. L. R. 743. In the notes following the opinion, A. L. R. comments upon contracts with unions of employees, at page 781, as follows:

“Many declaratory judgments have been rendered with respect to the construction and effect of con-

tracts between employers and unions of employees, commonly called collective bargaining agreements, including questions of seniority.”

citing, among others:

Loew's Incorporated v. Basson, et al., 46 F. Supp. 66. (App. 8): where the parties are the same as in the present case, in that Loew's Incorporated, the plaintiff there, is a defendant and appellee here, and the IATSE, parent organization of the Local Union sued as defendant there, is likewise a defendant and appellee here; in that the issue was upon the jurisdiction of the court to render a declaratory judgment, in that case pending the negotiation of a new collective bargaining contract, and here after the contract was made; in that there were controversies in the two cases over the terms of the proposed and existing contracts, respectively; in that the IATSE was demanding illegal contract provisions, that would have violated the Sherman Anti-Trust consent decree against the Motion Picture Companies, and was accompanying these demands with threats and coercion, similar to its conduct in this case; and in that the IATSE was thereby seeking to draw Loew's Incorporated, and the other companies mentioned, into an illegal conspiracy against independent companies, as well as the major companies, just as the appellees in this case have conspired against plaintiffs, the independent companies, and public interest. (*Supra*, 21, 23.)

In the *Loew's* case the court found that an actual controversy existed; that Loew's Incorporated and the other

Motion Picture Companies, generally the same as the appellees in this case, were engaged in interstate commerce; the IATSE was attempting a boycott against the independent companies; and the demands made by the IATSE would have placed the Motion Picture Companies, and the IATSE, in violation of the Sherman Act and the consent decree against the major companies. (App. 14-16.)

Headlines have been interspersed in the recital of plaintiffs' complaint in this case (*supra* 6-24), and in the quoted recitals of *Loew's Incorporated v. Basson* (app. 8-16), for convenience in turning to the particular allegations in the two cases.

The Court Has Jurisdiction in This Case Because It Arises Under the Constitution and Laws of the United States as Specified, Particularly the National Labor Relations Act, and the Labor-Management Relations Act.

Please see law specified (*supra* 1-5).

The Exhibit "A" contract between plaintiffs' Carpenters Union, Local No. 946, and the appellee Motion Picture Companies, and Association (*supra* 10), alone, and as confirmed by the Exhibit "B" contracts between plaintiffs' Carpenters Union and the IATSE (*supra* 11), and the Exhibit "C" contract between plaintiffs' Carpenters Union and the IATSE Grips, Local 80 (*supra* 13), and the Exhibit "D" arbitration award, and the Exhibit "F" clarification thereof, rendered by the Executive Council of the American Federation of Labor (*supra* 14), under an arbitration agreement to which the appellee Motion Picture Companies, and Association, were parties [Par. XIX, R. 12], were executed under the National Labor Relations Act.

29 U. S. C. A. 157 (*supra* 5):

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Collective Bargaining Contract Binding Through 1948

The Exhibit "A", Collective Bargaining Contract between the appellee Motion Picture Companies and the various craft unions, including plaintiffs' Carpenters Local No. 946, was dated July 2, 1946 [R. 28], was for a period of two years, provided for the carpenters to go back to work without discrimination against them [R. 32]:

"Contract for two years. If living costs go up 5% or more between July 1st and December 31st, 1946, unions may demand renegotiation of wages only.

"Bureau of Labor Statistics for local area to be the authority.

"All crafts going back to work Wednesday a. m. July 3, 1946, without discrimination."

This contract is now in effect as a valid and binding collective bargaining contract under said National Labor Relations Act.

Work Contracted to Carpenters' Union

This collective bargaining contract relates to the carpenters' work established over a long period of years (*supra* 10), and is to be considered in the light of the successive contracts between the Carpenters Union and the IATSE, and of the Arbitration Award made by Executive Council of the American Federation of Labor, as follows:

The Exhibit "B" agreement between the IATSE and the Carpenters Union dated July 9, 1921, divided the work [R. 37], as follows:

"It is agreed by the International Alliance of Theatrical Stage Employees that all work done on lots

or location and all work done in shops, either bench or machine work, comes under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America.

“It is agreed that:

“All carpenter work in and around Moving Picture Studios belongs to the carpenter. This includes:

“1. Any and all carpenter work in connection with the Moving Picture Studios, the construction of stages or platforms on which buildings or parts of buildings are to be erected.

“2. All carpenter work in connection with the erection of any building or part of building, from which a picture is to be taken.

“3. The operation of all wood-working machinery in the making of all furniture, fixtures, trim, etc., for use in Motion Picture Studios, belongs to the carpenters.

“The carpenters lay no claim to what is usually termed or referred to as the property man, or those employed in placing furniture, laying carpets, hanging draperies, pictures, etc.

“It is clearly understood that insofar as Section 2 of this part of the agreement is concerned and particularly the right to the setting up striking of the scenes on the stages after the construction work has been completed, it shall be liberally and co-operatively construed so as to do no injustice to either the United Brotherhood of Carpenters and Joiners of America or the International Alliance of Theatrical Stage Employees.”

The Exhibit "B" agreement between the IATSE and the Carpenters Union, dated February 5, 1925, divided the work [R. 36], as follows:

"Fifth. Division of work, by the United Brotherhood of Carpenters and Joiners.

"Section 1. All trim and mill work on sets and stages.

"Section 2. All mill work and carpenter work in connection with studios.

"Section 3. All work in carpenter shops.

"Section 4. All permanent construction.

"Section 5. All construction work on exterior sets.

"Division of work, by the International Alliance Theatrical Stage Employees.

"Section 6. Miniature sets.

"Section 7. Property building.

"Section 8. Erection of sets on stages except as provided in Section 1.

"Section 9. Wrecking all sets, exterior and interior.

"Section 10. Erecting platforms for lamp operators and camera men on stages."

Exhibit "C" agreement between the IATSE Grips Local 80 and the Carpenters Local 946, divided the work [R. 39], as follows:

"That Motion Picture Studio Carpenters' Local 946 shall have jurisdiction over:

"1. All temporary and permanent building construction work and the maintenance of same. This shall not cover any building done for the purpose of photographing.

“2. The installing and handling of all hardware and glass.

“3. The complete building, erection, re-erection and remodelling of all sets, streets, parts of sets and retakes, including sufficient platforms for shooting same, but not including platforms used exclusively for the camera, lighting equipment and dolly tracks. Sets used for process or trick photography shall be considered the same as any other sets.

“4. The building and manufacturing of all grip equipment which is made of wood or wood substitutes.

“5. All wood crating for shipping or storing.

“6. The operation of all woodworking machinery.

“7. The construction and remodelling of all cut-outs and the erection of same, with the exception of fold and hold cut-outs.

“8. Heavy construction on all wooden diffusing frames.

“9. The building or erection and dismantling of all scaffolds for construction, with the exception of tubular steel scaffolding.

“10. Remodelling of all sets while shooting on studios or on location.

“11. The underpinning and construction of all platforms, with the exception of those used exclusively for camera, light and dolly track platforms.

“That Motion Picture Studio Grips’ Local 80 shall have jurisdiction over:

“1. The handling of all sets and units from the mill to the stage, from stage to stage, from stage to scene dock, from scene dock to mill, and from scene dock to stage.

“2. The handling and maintenance of all grip equipment.

“3. The erection and handling of all fold and hold cutouts.

“4. The construction, maintenance and handling of all diffusing frames, with the exception of heavy construction on wooden frames.

“5. The building, erection and dismantling of all tubular steel scaffolding. This is not to include underpinning.

“6. The construction of all platforms, including underpinning, for use exclusively by camera, lighting equipment and for supporting dolly tracks.”

Work Allocated by Arbitration Award.

The Arbitration Award rendered by the Executive Council of the American Federation of Labor made directions [R. 42], as follows:

“Hollywood Studio Union Strike and Jurisdiction Controversy:

“1. The Council directs that the Hollywood strike be terminated immediately.

“2. That all employees return to work immediately.

“3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.

“4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.

“5. That all parties concerned, the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, the United Brotherhood of Carpenters and

Joiners of America, * * * accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render.”

and allocated the work [R. 47], as follows:

“Division of work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

“Sec. 1. In the taking of motion pictures, the operating of all lights or lamps, and all lighting effects, and the setting up and striking same on stages or locations.

“Sec. 2. The handling and operating of all equipment pertaining to the lighting of sets, such as plugging boxes, spiders, plugs, flexible stage cable, all lamps and all electrical effects pertaining to the taking of moving pictures such as wind, rain, snow, storm and all other effects, except where wind machine is operated electrically.

“Sec. 3. The operating of all switchboards, whether they are permanent or portable, this is not to apply to generator rooms or portable generators sets, which shall be operated by members of the International Brotherhood of Electrical Workers of America.

“Sec. 4. The operation of all moving picture machines. (April 15, 1936, Amendment.) In the taking and recording of sound motion pictures, the operating of all sound equipment and all sound effects, and the setting up and striking of same on stages and locations.”

and to the Carpenters [R. 54], as follows:

“Division of work by the United Brotherhood of Carpenters and Joiners of America:

“Section 1. All trim and mill work on sets and stages.

“Section 2. All mill work and carpenter work in connection with studios.

“Section 3. All work in carpenter shops.

“Section 4. All permanent construction.

“Section 5. All construction work on exterior sets.

“Division of work by the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada:

“Section 6. Miniature sets.

“Section 7. Property building.

“Section 8. Erection of sets on stages except as provided in Section 1.

“Section 9. Wrecking all sets, exterior and interior.

“Section 10. Erecting platforms for lamp operators and camera men on stages.

“This decision is applicable to the Motion Picture Industry and none other, and is not to be construed as interfering with or disrupting any jurisdiction otherwise granted the United Brotherhood of Carpenters and Joiners of America by the American Federation of Labor.”

The Exhibit “F” letter to the Arbitration Committee of the American Federation of Labor, dated August 16, 1946, contained the following clarification of said award [R. 57]:

“The Committee took cognizance of the allegations contained in a report submitted to President Green

by Organizer Daniel V. Flannagan under date of August 9, 1946. According to a brief embodied therein Studio Carpenters Local 946, U. B. of C. & J. of A., alleges that certain violations have taken place whereby the carpenters jurisdiction set forth in the directive has been encroached upon.

“Jurisdiction over the erection of sets on stages was awarded to the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada under the provisions set forth in Section 8 of the decision which specifically excluded trim and mill work on said sets and stages. The word erection is construed to mean assemblage of such sets on stages or locations. It is to be clearly understood that the Committee recognizes the jurisdiction over construction work on such sets as coming within the purview of the United Brotherhood of Carpenters and Joiners jurisdiction.

“Section 2 to 5 inclusive recognized the rightful jurisdiction of the United Brotherhood of Carpenters and Joiners of America on all mill work and carpenter work in connection with studios, all work in carpenter shops, all permanent construction and all construction work on exterior sets.

“In view of the alleged violations, the Committee hereby direct that all participants in the Hollywood Motion Picture Studio dispute strictly adhere to the provisions of the directive handed down on December 26, 1945.”

Controversy Over Work Easy of Solution by Declaratory Judgment.

With the work allocated in said successive contracts, and by said A. F. of L. award and clarification, and with no justifiable reason for the attempt of appellees to deprive the Carpenters of the work specified in said contracts and award, it is submitted that this is peculiarly a case calling for declaratory relief.

Collective Bargaining Federal Rights Inure to Individual Union Members.

Said collective bargaining contracts inured to the benefit of plaintiffs, and the class for whom they sue, and each of them, as their individual federal rights.

J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762 at 766:

“* * * an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement. * * *”

These rights are guaranteed by the V and XIV Amendments to the Constitution (*supra* 5):

Constitution, Amendment V:

“No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *”

Constitution, Amendment XIV:

“Section 1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law; * * *”

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, at 182:

“* * * As we have pointed out with respect to the like provision of the National Labor Relations Act in *J. I. Case Co. v. National Labor Relations Bd.* *supra* (321 U. S. 338, 88 L. Ed. 768, 64 S. Ct. 576) ‘The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit.’ The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it.”

Question Not a “Jurisdiction Dispute.”

And at page 184:

“Since the right asserted by petitioner ‘is . . . claimed under the Constitution’ and a ‘statute of the United States,’ the decision of the Alabama court, adverse to that contention is reviewable here under § 237 (b) of the Judicial Code, 28 USCA § 344, 8 FCA title 28, § 344, unless the Railway Labor Act itself has excluded petitioner’s claims from judicial consideration. The question here presented is not one of a jurisdictional dispute, determinable under the administrative scheme set up by the Act, * * *”

Court Has Jurisdiction.

And at page 186:

“In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. The right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. * * * As we noted in *General Committee of Adjustment, B. L. E. v. Missouri-Kansas Texas R. Co.* *supra* (320 U. S. 331, 88 L. Ed. 81, 64 S. Ct. 146), the statutory provisions which are in issue are stated in the form of commands. For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & N. O. R. Co., Brotherhood of R. & S. S. Clerks*, *supra* (221 U. S. 556, 557, 560, 74 L. Ed. 1039, 1041, 50 S. Ct. 427), and in *Virginia R. Co. v. System Federation, R. E. D.* *supra* (300 U. S. 548, 81 L. Ed. 799, 57 S. Ct. 592), and like it is one for which there is no available administrative remedy.”

The Court Has Jurisdiction Because the Conspiracy of the Appellees Herein, for the Appellee Motion Picture Companies, and Association, to Employ Non-Union Permittees, Designated by IATSE, in a Quasi Open Shop Operation, and in Substitution for Carpenters Under Their Collective Bargaining Contract, Constitutes an Attack Upon, and an Attempt to Nullify, the National Labor Relations Act.

The statement made under the preceding proposition is here respectfully adopted.

The Exhibit "E", "Emergency Working Card", of the Division of Set Erection, IATSE Local 468, issued to E. Snow, on November 18, 1946, "under conditions set forth on back of this card", as said exhibit, is set forth in the Record at page 56, is as follows:

"This card issued for work under the Jurisdiction of Local 468 of the I. A. T. S. E. and M. P. M. O. of U. S. and Canada. The undersigned in accepting this Emergency Working Card authorizes, designates and chooses the said Labor Organization to negotiate, bargain collectively, present and discuss grievances with the above employer as his representative and sole, exclusive collective bargaining agency in all respects. The undersigned agrees to abide by the Constitution and By-Laws, decisions, rules, regulations, and working conditions of Local 468 of the I. A. T. S. E. and M. P. M. O. of U. S. and Canada. *The undersigned will surrender this Emergency Working Card and the position held thereunder upon demand of Local 468. It is recognized that the issuance and acceptance of this Emergency Working Card does not entitle the undersigned to membership in Local 468 or to any rights against or within said Union.* (Italics ours.)

"Agreed to Elzyn Snow"

It is respectfully submitted that the public interest, at this critical time in our country's history, requires a clear-cut, judicial determination that no industry is big enough, that no labor organization is strong enough, and that no combination is powerful enough, to nullify the laws of the United States.

Andrew Jackson put an end to nullification.

American Federation of Labor, et al. v. J. Tom Watson, et al. 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873 at 878:

“* * * We do not pass on the question whether the District Court had jurisdiction under § 24 (1) or § 24 (14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in § 24 (8) of the Judicial Code, 28 USCA § 41 (8), 7 FCA title 28, § 41 (8) which grants the federal district courts jurisdiction of all ‘suits and proceedings arising under any law regulating commerce.’ As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit ‘arising under’ a federal law ‘regulating commerce.’”

The Court Has Jurisdiction in This Case Because It Arises Under the Constitution and Laws of the United States as Specified, Particularly the Civil Rights Act.

Please see laws specified (*supra* 1-5), particularly:

28 U. S. C. A. 41 (12) and (14) (*supra* 2);

28 U. S. C. A. 729 (*supra* 3);

8 U. S. C. A. 43 and 47 (3) (*supra* 4).

It has been shown in the beginning of this argument that the plaintiffs, and the class for whom they sue, have a human and property right, a constitutional and statutory right, to work under their lawful contract of employment (*supra* 29-30). It has been shown in argument that this right, employment under collective bargaining contract, enures to the individual (*supra* 48). It is now submitted that this is a civil right. The deprivation of this civil right, by conspiracy and action of appellees is so closely related to the deprivation of their right to work under the collective bargaining contract, that the facts set forth in those sections of argument are here respectfully adopted to avoid repetition (*supra* 39, 51).

Nissen v. International Brotherhood of Teamsters, et al. (*supra* 30);

Steele v. Louisville & Nashville R. R. Co. (*supra* 49);

American Federation of Labor v. Tom Watson (*supra* 52).

Picking v. Pennsylvania R. Co., 151 F. (2d) 240, at 244:

“It is appropriate, therefore, to refer to the decisions of the Supreme Court in *Polk Co. v. Glover*,

305 U. S. 5, 59 S. Ct. 15, 83 L. Ed. 6; and *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 55 S. Ct. 187, 79 L. Ed. 281. In the latter case it was said by Mr. Justice Stone and Mr. Justice Cardozo in the concurring opinion, *id.* 293 U. S. at page 213, 55 S. Ct. at page 193, 79 L. Ed. 281, 'We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.' "

And at 249:

"The provisions of R. S. § 1979 are sufficiently clear to meet the tests required by the Due Process Clause of the Fifth Amendment. No question as to the sufficiency of the statute to grant a right of civil action should now be heard."

* * * * *

"The corporate defendant, The Pennsylvania Railroad Company, however, is not an agency of any state. It is a privately owned railroad corporation. It has moved to dismiss the complaint upon the ground *inter alia*, that 'There is nothing in the allegations of the Complaint that the Pennsylvania Railroad Company did other than transport as a common carrier the complainants while in the custody of officers of the law.' But if, as the plaintiffs assert this defendant 'materially and physically participated in' all the alleged unlawful acts of September 15, 1941, it may have joined in, or as the plaintiffs put it, 'adopted' the conspiracy as its own. * * *

The Pennsylvania Railroad Company has not made use of any of the methods available to compel the plaintiffs to bring their case out in the open. In the absence of such action by the Railroad Company we

may not conclude that the plaintiffs have not stated a valid cause of action under the Civil Rights Act against it.”

Bartling v. C. I. O., 40 Fed. Supp. 366:

“This is an action brought by two Ford employees who allege that as a result of the wrongful acts and conspiracy of defendants, the Communist Party of the United States and the Congress of International Organizations, each voluntary associations, they, suffered bodily injury and, are now continually threatened with being deprived of their right to work. * * * Each defendant, through respective counsel, insists that this court has no jurisdiction to try and hear the issues involved since many of the individual members of each defendant are residents, inhabitants, and citizens of the State of Michigan, as are plaintiffs.”

And at 369:

“We find that the question of jurisdiction raised in this case is covered entirely, either directly or by reasonable deduction, by the case of *United Mine Workers of America et al. v. Coronado Coal Company et al.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762. In truth the Coronado facts seem to be on all fours with the matter at bar. Up to the time of the Coronado decision, there seemed to be no holding or law, other than those passed in some individual states, permitting action against an unincorporated union as such. But the Supreme Court in the above case in an opinion by Chief Justice Taft settled the question by holding (1924) in effect that the development of labor unions and centralization of power and property in one central body with the right to absolutely control, crown, or decapitate

even the individual organizers and officers of local unions was of such a corporate nature that public policy demanded that having acquired protection and benefits under the laws of the United States they should also be required under some circumstances to respond in federal courts. Defendants do not deny right of plaintiffs to sue each of them in the proper tribunal, which they say is either the state court or if in the federal court, then at their official residence whenever a federal question is involved, such as to-wit: the right to work.”

And at 369:

“We deny the motion herein discussed * * *. We believe that in general the bill of complaint is sufficient.”

It is also submitted that cases under the Fourteenth Amendment to the Constitution, relating to violation of civil rights of public authorities, are applicable in principle to the violation of civil rights of private persons.

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 at 1327:

“We think it plain that the district court had jurisdiction as a federal court to hear and decide the question of the constitutional validity of the ordinance, although there was no allegation or proof that the matter in controversy exceeded \$3,000. By 8 USCA § 43, 2 FCA Title 8, §43 (derived from §1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13, c. 22, continued without substantial change as Rev. Stat. §1979) it is provided that ‘every per-

son who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.'

"As we held in *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 507-514, 527-532, 83 L. ed. 1423, 1432-1436, 1443-1446, 59 S. Ct. 954, the district courts of the United States are given jurisdiction by 28 USCA § 41 (14), 7 FCA Title 28, §41 (14) over suits brought under the Civil Rights Act without the allegation or proof of any jurisdictional amount. Not only do petitioners allege that the present suit was brought under the Civil Rights Act, but their allegations plainly set out an infringement of the provisions. In substance, the complaint alleges that respondents, proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and the complaint seeks equitable relief from such deprivation in the future."

The Court Has Jurisdiction in This Case Because It Arises Under the Constitution and Laws of the United States as Specified, Particularly the Sherman Anti-Trust Act.

Please see laws specified (*supra* 1-5).

Excerpts from the decision of the United States District Court for the Southern District of New York in the case of *Loew's Incorporated, et al. v. Basson, et al.*, 46 F. Supp. 66, are set forth in the appendix hereto. They give a copious statement of the allegations in the complaint of Loew's Incorporated. It is requested that the court take judicial cognizance of the following admissions in said allegations:

1. The parties: That the plaintiff there, and the major motion picture companies mentioned by it, are defendants here; and that the defendant union there is a local of IATSE, a defendant here [App. 8];

2. That Loew's Incorporated, and its associated major motion picture companies, appellees here, have violated the Sherman Anti-Trust Act, and are operating under a consent decree [App. 10];

3. That while Loew's Incorporated was negotiating with the IATSE local for a new collective bargaining contract, said IATSE local demanded that the new contract include provisions which Loew's Incorporated alleged to be illegal and in violation of said consent decree [App. 11];

4. That in pressing said demands said IATSE local made threats against Loew's Incorporated and other companies [App. 13].

The court is also requested to take cognizance of the fact that Loew's Incorporated prayed for a declaratory judgment in said action to decree that the inclusion of the demands made by IATSE local would be in violation of the consent decree, and that if all distributors should comply with the IATSE demands a conspiracy would result that would constitute a violation of the Sherman Anti-Trust Act App. 13].

It is requested that the court take cognizance of the findings of the court there:

- (1) That a real controversy existed [App. 14];
- (2) That Loew's Incorporated was engaged in interstate commerce [App. 14];
- (3) That IATSE local was attempting to compel Loew's Incorporated to force independent exhibitors licensed by it to employ only members of said IATSE local in its projection room, and that this would constitute a reverse secondary boycott [App. 15]; and
- (4) That the contract as demanded by the IATSE local would constitute a violation of the Sherman Anti-Trust Act [App. 15].

It is also requested that the court take cognizance of the decision of the court there denying the motion of the IATSE local to dismiss the said suit of Loew's Incorporated for want of jurisdiction [App. 16].

Reference is made to the statement of the allegations made by plaintiffs in the pending case (*supra* 16-24). Upon comparison of the allegations in the two complaints

it is submitted that the court has jurisdiction here upon the same principle as jurisdiction was taken there.

Allen Bradley Company, et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 at 1942:

“The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods.”

At 1943:

“Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local’s members. Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers. The success is illustrated by the fact that some New York manufacturers sold their goods in the protected city market at one price and sold identical goods outside of New York at a far lower price. All of this took place, as the Circuit Court of Appeals declared, ‘through the stifling of competition,’ and because the three groups, in combination as ‘copartners,’ achieved

‘a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.’ Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed.

“Quite obviously, this combination of business men has violated both §§(1) and (2) of the Sherman Act, unless its conduct is immunized by the participation of the union. For it intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 512, 513, 84 L. ed. 1311, 1333, 1334, 60 S. Ct. 982, 128 ALR 1044. Our problem in this case is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?

“The Sherman Act as originally passed contained no language expressly exempting any labor union activities.”

And at 1948:

“* * * Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

“Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. * * *”

And at 1949:

“This brings us to a consideration of the scope of the declaratory judgment and the injunction granted by the district court. We cannot sustain the judgment or the injunction in the form in which they were entered. The judgment and the injunction apply only to the union, its members, and its agents, since they were the only parties against whom relief was asked. The judgment declared that ‘the combination and conspiracy and the acts done and being done in furtherance thereof all as set forth in the findings of fact herein are unlawful and contrary to the . . . Sherman Anti-Trust Law, as amended and supplemented.’

And at 1950:

“Respondents objected to the form of the injunction and specifically requested that it be amended so as to enjoin only those prohibited activities in which the union engaged in combination ‘with any person, firm or corporation which is a non-labor group . . .’ Without such a limitation, the injunction as issued runs directly counter to the Clayton and the Norris-La Guardia Acts. The district court’s refusal so to limit it was error.

“The judgment of the Circuit Court of Appeals ordering the action dismissed is accordingly reversed and the cause is remanded to the district court for modification and clarification of the judgment and injunction, consistent with this opinion.”

Following the Dismissal of This Suit for Want of Jurisdiction, on the Ground That There Was No Diversity of Citizenship, and Pending This Appeal, Congress Enacted the Labor-Management Relations Act of 1947, and in It Provided Unquestioned Jurisdiction in This and Like Cases.

This intention of Congress is shown by the discussion in the House debate on H. R. 3020, Congressional Record, April 17, 1947, page 3734:

“The Chairman: The gentleman from North Carolina is recognized for 5 minutes.

Mr. Barden: Mr. Chairman, I take this time for the purpose of asking the Chairman a question, and in asking the question I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation.

It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; in other words, proceedings could, for example, be brought by the employers, the labor organizations, or interested individual employees under the Declaratory Judgments Act in order to secure declarations from the Court of legal rights under the contract.

Mr. Hartley: The interpretation the gentleman has just given of that section is absolutely correct.

Mr. Case of South Dakota: Mr. Chairman, will the gentleman yield?

Mr. Barden: I yield.

Mr. Case of South Dakota: Would the gentleman and the Chairman agree that that also includes declaratory judgments in the case of jurisdictional disputes?

Mr. Barden: I would so understand it.

Mr. Case of South Dakota: I would like to have that in the record also because declaratory judgments is a proceeding which has been adopted in the case of jurisdictional disputes.

Mr. Barden: I think the language is clear, but I want to make it certain.

Mr. Case of South Dakota: That is involved, and I refer to declaratory judgments. It is involved in the case of the motion picture players of California and I think we can strengthen the hands of those who are trying to get that matter straightened out.

Mr. Barden: It will minimize lawsuits and cut down the length of these controversies. That is the purpose of it."

The Labor-Management Relations Act of 1947, known as the Taft-Hartley Bill, as enacted on June 23, 1947, contains the following sections giving or confirming, this jurisdiction:

"Sec. 301 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

“Sec. 303 (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

“(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

“(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

“(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. * * *”

“(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.”

This provision of the new law is supported by the following precedent:

Federal Deposit Ins. Corporation v. George-Howard, 153 F. (2d) 591, at page 593, states:

“The Federal Deposit Insurance Corporation brought suit in the District Court (a) for a determination of its right to interest, during the liquidation of a Missouri state bank, on the deposits which it had insured and paid under 12 U. S. C. A. §264, 49 Stat. 684, and for which it had taken assignments and subrogation from the depositors; and (b) for an order directing payment to it of a fund, in the amount of such interest, which had been placed in escrow by the sole stockholder of the bank under an agreement with the Corporation, made after all other claims of creditors had been satisfied * * *”

“The District Court dismissed the action, 55 F. Supp. 921, after trial, on the grounds (1) that the controversy was not one arising under the laws of the United States, within the meaning of section 24(1)(a) of the Judicial Code, 28 U. S. C. A. §41(1)(a), as a basis for federal jurisdiction; and

(2) that, even if jurisdiction had thus existed, a federal court ought not to exercise it in the situation for comity reasons, but should leave the controversy to be presented to the state circuit court which had supervised the liquidation. The Corporation has appealed.

“We think the District Court was in error in each of these holdings.

“(1) As to the first holding, the statute creating the Federal Deposit Insurance Corporation, after giving the Corporation power generally to ‘sue and be sued, complain and defend, in any court of law or equity, State or Federal,’ further expressly provides, 12 U. S. C. A. §264(j), Fourth, 49 Stat. 692, that ‘All suits of a civil nature at common law or in equity to which the Corporation (in its own capacity) shall be a party shall be deemed to arise under the laws of the United States.’ This special provision reasonably can only mean that all such suits to which the Corporation is a party in its own capacity must legally be regarded as arising under the laws of the United States, within the jurisdiction granted to the federal District Courts by section 24(1)(a) of the Judicial Code, 28 U. S. C. A. §41(1)(a).”

Certiorari was denied by the Supreme Court on October 14, 1946. 91 L. Ed. Adv. 39.

Conclusion.

The immediate issue here is whether the United States District Court has jurisdiction in this suit, for declaratory relief, arising under the Constitution and laws of the United States.

It has been shown that appellants, and the class for whom they sue, carpenters, have a sacred, constitutional and statutory, human and property, right to work under their lawful collective bargaining contract with the appellee Motion Picture Companies (*supra* 29-30);

It has been shown that the Federal Declaratory Judgment Act was intended to, and does, provide a remedy to determine rights and obligations under collective bargaining contracts, including the determination of controversies arising under motion picture contracts, and that the Act should be construed liberally (*supra* 31);

It has been shown that the court has jurisdiction:

1. Because this case to declare the rights and obligations of all parties concerned under the Exhibit "A" collective bargaining contract between Carpenters Union and appellee Motion Picture Companies, and Association, and the related Exhibits "B" and "C" contracts between the Carpenters Union and IATSE, and the Exhibit "D" A. F. of L. Arbitration Decision and Award thereon, to which appellee Motion Picture Companies were a party, arises under the Constitution and laws of the United States, particularly the National Labor Relations Act (*supra* 39);

2. Because the case arises under said Act, by reason of the conspiracy of the appellee Motion Picture Companies, and Association, and IATSE, to nullify the Na-

tional Labor Relations Act, and collective bargaining contract made thereunder, by substituting their arbitrary quasi open-shop operation in which the companies employ non-union permittees, designated by the IATSE, in substitution for union carpenters under said collective bargaining contract (*supra* 51);

3. Because the case arises under the Civil Rights Act (*supra* 53); and

4. Because the case arises under the Sherman Anti-Trust Act (*supra* 58).

The jurisdiction of the court has been confirmed, and placed beyond question, by the provisions of the Labor-Management Relations Act of 1947.

The underlying issue in this case is whether the management in any company, or companies, in any industry, is big enough, or the control in any labor organization, or organizations, is strong enough, or the combination of them in conspiracy is powerful enough, to contemptuously set aside the laws of Congress, and substitute their arbitrary will for the lawful functions of the Government of the United States (*supra* 52).

This is no ordinary case. It deals with the need for law and order in the human and legal relationship of management and labor, with respect for government, and with the present need for stability in national economy. In these needs it offers the practical remedy of declaratory judgments for the settlement of controversies over rights and obligations under collective bargaining contracts, not for burdensome use in every controversy that arises, but to bring an end to those arbitrary and unnecessary controversies that should never exist by making this speedy remedy available.

Appreciation is respectfully expressed to these individual carpenters, arbitrarily deprived of their right to work, for their courage in bearing the burden of this case, in the hope that the Departments and Agencies of government may accept the responsibility of utilizing the documentary evidence presented here. Gratification is also respectfully expressed that the United Brotherhood of Carpenters and Joiners of America, their own union, made a defendant here so as to bring all parties before the court, entered its appearance with the statement that it “does not contest the granting of the prayer of plaintiffs’ amended complaint” [R. 68, *supra* 24].

Wherefore, appellants respectfully pray that hearing be advanced in the public interest, that the judgment of the lower court be reversed, and that the case be remanded for trial.

Respectfully submitted,

ZACH LAMAR COBB,

Attorney for Appellants.

APPENDIX.

Memorandum Opinion.

This action for a declaratory judgment is brought by sixteen individuals, members of the United Brotherhood of Carpenters and Joiners of America (hereinafter called Carpenters), on behalf of themselves and others similarly situated, to determine and to protect against alleged conspiracy their rights under certain agreements entered into between the motion picture studios, Carpenters, the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada (hereinafter called Stagehands), and others. The defendant studios and Stagehands have moved to dismiss on the grounds that: (1) this court lacks jurisdiction; (2) the court should, in the proper exercise of its discretion, decline to assume jurisdiction; and (3) the complaint fails to state a claim upon which relief can be granted. [101]

The forty-eight page complaint when analyzed presents nothing more or less than a request that this court interpret a private contract or agreement allocating certain work on stage sets in the moving picture industry. As stated by counsel in oral argument, the difference between the parties is simply who is "to drive the nails." The serious question before the court is whether this court has jurisdiction in the absence of diversity of citizenship.

Thus, we have an action in which private individuals ask this court to construe their rights under a contract negotiated on their behalf by a labor union, and to protect such rights from interference with or invasion by

other persons acting individually or in conspiracy with each other. Since this is a court of limited jurisdiction, every case brought here must fall within the terms of a provision of some statute of the United States. Plaintiffs allege (paragraph VIII):

“Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code Annotated; Section 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV.”

If the case does not fall within the terms of one or more of these statutes or amendments to the Constitution, the court must dismiss the action for want of jurisdiction.

28 United States Code Annotated 41(12) and 8 United States Code Annotated 47(3) give the District Courts jurisdiction in suits for damages on account of injury to the plaintiff's person or property, or the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of a conspiracy. Under 28 United States Code Annotated 41(12), damages are an essential part of the judgment, and damages will vary from person to person. Their rights are several, and a judgment in this action will not bind the parties not before the court. *Pentland v. Dravo Corp.*, 3 Cir., 152 F. (2d) 851; [102] *Bethlehem Shipbuilding Corp. v. Nylander*, 14 Fed. Supp. 201. The decision here would not settle the entire controversy, and where that cannot be done, a complaint seeking a declaratory judgment should

be dismissed. *Angell v. Schram*, 6 Cir., 109 F. (2d) 380, 382; *United Electrical R. & M. W. v. Westinghouse Electric Corp.*, 65 Fed. Supp. 420, 423; *Koon v. Bottolfsen*, 60 Fed. Supp. 316.

Disregarding the limitations of said section on account of the requirement of damages, this court would still be without jurisdiction, since these statutes were passed to protect individuals from violations of their rights by State action, and none is here alleged. *Love v. Chandler*, 8 Cir., 124 F. (2d) 785, 786-7. Only rights of citizens under the laws of the United States are protected. *Mitchell v. Greenough*, 9 Cir., 100 F. (2d) 184, cert. denied 306 U. S. 659, 83 L. Ed. 1056, 59 S. Ct. 788. That being true, since more than Three Thousand Dollars is admittedly involved, this section can in no event confer any jurisdiction not already given by 28 U. S. C. A. 41(1), which is hereinafter discussed.

28 U. S. C. A. 41(1) and 8 U. S. C. A. 43 both provide for redress for deprivation of rights under color of any law, statute, ordinance, regulation, custom, or usage of any State or Territory, in express terms. It is not alleged that the defendants are acting under color of any State law, etc. so these sections cannot act to establish jurisdiction in this court. *Allen v. Corsane*, 56 Fed. Supp. 169; *California Oil & Gas Co. v. Miller*, 96 Fed. 12, 22; *Picking v. Pennsylvania R. R.*, 151 F. (2d) 240, is not applicable here, because the wrongs alleged in that case were all under color of State law.

28 U. S. C. A. 729 merely establishes the procedure to be followed by the federal courts in certain classes of cases. This section has reference not to the extent or scope of jurisdiction, nor to the rules of decision, but to

the forms of procedures and remedy. In re Stupp, 23 Fed. Cas. No. 13,563; United States v. Reid, 12 How. 361, 365, 53 U. S. 361, 365, 13 L. Ed. 1023; 1025; Scaffidi v. United States, [103] 1 Circ., 37 F. (2d) 203, 207.

The Fifth and Fourteen Amendments of the Constitution are designed to protect the individual from invasion of his rights, privileges and immunities by the federal and the State governments respectively. Corrigan v. Buckley, 271 U. S. 323, 330, 70 L. Ed. 969, 46 S. Ct. 521; Civil Rights Cases, 109 U. S. 3, 27 L. Ed. 969, 46 S. Ct. 521; neither Hague v. C. I. O., 307 U. S. 496, 83 L. Ed. 1385, 59 S. Ct. 972, 122 A. L. R. 695, nor Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 162 A. L. R. 1330, has overruled these cases, even by implication, for the wrongs complained of in both the Hague and the Screws cases were committed by the government or under color of law.

28 U. S. C. A. 41(8) confers jurisdiction on the District Courts of the United States in "all suits and proceedings arising under any law regulating commerce," without regard to the jurisdictional amount requirement of 28 U. S. C. A. 41(1). Since more than Three Thousand Dollars is involved in this action, Section 41(8) will not establish jurisdiction in this court if it cannot be established under Section 41(1), which grants jurisdiction in all suits where the matter in controversy exceeds Three Thousand Dollars and "arises under the Constitution or laws of the United States."

It is not enough that the dispute should merely affect commerce to bring it within the scope of Section 41(8) or Section 41(1). Delaware, Lackawanna & Western R. R. v. Slocum, 56 Fed. Supp. 634.

In *Gully v. First National Bank*, 299 U. S. 109, 81 L. Ed. 70, 57 S. Ct. 96, Mr. Justice Cardozo said, at page 112:

“To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. * * * The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.” [104]

Plaintiffs do not claim any violation of the right to bargain collectively under the National Labor Relations Act, 29 U. S. C. A. 157, nor the right to contract for employment, nor the right to contract collectively for employment. Plaintiffs assert that the right to work at one’s chosen vocation within the terms of a contract negotiated under federal law, the National Labor Relations Act, has been violated. The bare right to work is not a right protected by federal law. *Love v. United States*, 8 Cir., 108 F. (2d) 43, cert. denied 309 U. S. 673, 84 L. Ed. 1018, 60 S. Ct. 716, and cases therein cited; *Brents v. Stone*, 60 Fed. Supp. 80, 84; *Emmons v. Smitt*, 58 Fed. Supp. 869, affirmed 6 Cir., 149 F. (2d) 869, 872.

From the mere fact that a right was established by federal law, it does not follow that all litigation growing therefrom arises under the laws of the United States. Actions growing from the issue of federal land grants do not arise “under the laws of the United States.” *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 44 L. Ed. 864, 20 S. Ct. 726; *Shulthis v. McDougal*, 225 U. S. 561, 569, 56 L. Ed. 1205, 32 S. Ct. 704, 707; *Marshall*

v. Desert Properties, 9 Cir., 103 F. (2d) 551, cert. denied 308 U. S. 563, 84 L. Ed. 473, 60 S. Ct. 74. An action brought to enforce a right under a contract which is made as the result of rights granted under the patent laws to receive royalties upon sale or license of the patented device is not an action arising under the laws of the United States. *Odell v. Farnsworth*, 250 U. S. 501, 504, 63 L. Ed. 1111, 39 S. Ct. 516. To come within the provisions of these sections, the suit must really and substantially involve a dispute respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. *Malone v. Gardner*, 4 Cir., 62 F. (2d) 15; *Delaware, Lackawanna & Western R. R. v. Slocum*, 56 Fed. Supp. 634.

The only important issue in the case at bar is the interpretation of a contract. The meaning of this contract is not dependent on the National Labor Relations Act, whether it owes its existence to [105] that Act or not. A decision by this court that the Carpenters or the Stagehands, as the case may be, have the right to construct stage sets would not involve consideration of the validity, construction, or effect of the Act. The decision would be based purely and simply upon contractual principles. Therefore, this suit does not arise under the Constitution or laws of the United States, and this court lacks jurisdiction.

In this memorandum opinion, this court has not attempted to cover the broad field of law cited in over two hundred and twenty-five cases referred to in the two hundred pages of briefs. To do so would require the writing of a treatise on various phases of the subjects of juris-

diction of the United States District Courts in labor disputes.

I have only attempted to outline my reasons for my conclusion that this court lacks jurisdiction. In view of my conclusion, it is unnecessary to pass upon the other questions raised by the various motions.

The above entitled action is hereby ordered dismissed for want of jurisdiction.

Dated: This 25 day of Feby., 1947.

BEN HARRISON,
Judge.

Excerpts From

Loew's Incorporated v. Basson et al., 46 F. Supp. 66.

The following is being printed in the appendix, first, because of its length, and second, because of the necessity of referring to it repeatedly.

THE PARTIES.

“The complaint alleges that plaintiff produces and manufactures motion pictures in California and sends them, in interstate commerce, all over the United States to branch offices called ‘exchanges’ where exhibitors see them and apply for licenses which become binding contracts, known as license agreements, upon acceptance thereof by plaintiff. At these exchanges plaintiff maintains a staff of inspectors of film, repair men, and others who see to it that the positive prints of the films are sent to the various exhibitors, and who examine and repair the prints when they are returned by the exhibitors to the exchanges; in New York City, these employees and the men who deliver the films to the exhibitors are members of Local B 51 of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of United States and Canada (hereinafter referred to as ‘IATSE’), with whom plaintiff had a contract for a term commencing December 1, 1939 and expiring November 30, 1941, said employees continuing to be employed under the terms and conditions of said contract; that plaintiff could not continue in its business of distributing motion pictures without those employees; plaintiff has a contract with defendant Local 306 of the ‘IATSE’ for a term commencing September 1, 1935 and expiring August 31, 1945, with respect to the projection men employed in the sixty-five

theatres operated by plaintiff in the five boroughs of New York City; plaintiff also has a contract with defendant Local 306 with respect to the projection men employed at its home office and film exchange, the contract having expired on August 31, 1940; said employees have continued to be employed under its terms; in the event that plaintiff's sixty-five theatres should be unable to obtain prints and exhibit motion pictures, plaintiff would lose approximately \$400,000 per week; plaintiff and seven other motion picture distributors, Columbia Pictures Corporation, Paramount Pictures, Inc., R. K. O. Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Pictures Company, Inc., and Warner Bros. Pictures, Inc., collectively distribute a majority of the feature motion pictures of quality in the New York area. Each of these companies maintains an exchange in New York City for the distribution of motion pictures in the same manner as plaintiff does and all exhibitors operating motion picture theatres in the area serviced by the New York exchanges of the plaintiff and the other distributors are dependent upon a steady and constant supply of motion pictures to enable them to continue to operate their theatres; the projectionists employed by each of the other seven distributors in their exchanges and home offices, are also members of defendant Local 306, as are the projection men employed in the theatres operated by said distributors; plaintiff and each of the other seven distributors have entered into agreements with many of the independent exhibitors licensing the exhibition of motion pictures during 1941-42, each such license agreement calling for the delivery of prints from time to time, in accordance with the booking arrangements made between the exhibitors and the exchange, throughout the contract

period, and many of these booking arrangements have some time to run; that it would be impossible for the independent exhibitors to remain in business unless plaintiff and the other distributors perform these agreements; plaintiff's revenue derived from the licensing agreements has amounted in the past to over \$375,000 per year and if plaintiff were to be prevented from delivering the prints in accordance with its agreements for the 1941-42 season and from entering into new agreements, its loss would exceed \$400,000."

SHERMAN ANTI-TRUST CONSENT DECREE.

"The complaint also alleges that in July, 1938, the United States of America commenced a suit in equity against plaintiff and other distributors, alleging various violations of the Sherman Anti-Trust Act, 15 U. S. C. A., §§ 1 and 2, which culminated in the entry of a consent decree against them on November 20, 1940, and which provided that the consenting defendants, including this plaintiff, were enjoined from doing certain prohibited acts; section VI of said consent decree provides that no distributor defendant (including plaintiff) shall refuse to license its pictures for exhibition in an exhibitor's theatre on some run upon terms and conditions fixed by the distributor which are not calculated to defeat the purposes of the section. The only conditions stated in section VI aforesaid, with respect to the requirement that a distributor shall not so refuse to license its pictures, are that the exhibitor satisfy reasonable minimum standards of theatre operation, that the exhibitor be reputable and responsible, and that the granting of a run on any terms to such exhibitor will not have the effect of reducing the distributor's total film revenue in the competitive area in which

such exhibitor's theatre is located; that no other defense is available to a distributor defendant in an arbitration proceeding under the decree for a 'some run' award in accordance with the provisions of said decree."

ILLEGAL DEMANDS OF IATSE IN COLLECTIVE
BARGAINING NEGOTIATIONS.

"The complaint further alleges that on December 11, 1941, referring to a proposed new contract between plaintiff and Local 306 with respect to the projection men employed at plaintiff's New York exchange and home office, defendant Local 306, by its attorney, wrote plaintiff a letter which stated in part:

"* * * Local 306, is requesting that the collective agreement, to be executed between our respective clients, shall provide, among other satisfactory conditions of employment, such as wages, hours, working conditions, and term of contract, the following clauses in substance:

"1. Employer agrees to supply, rent, lease, sell, deliver, license, distribute or provide films in the City of Greater New York only to such exhibitors as employ and continue to employ solely members of Local 306 as projectionists, and the Employer agrees not to supply, rent, lease, sell, deliver, license, distribute or provide film to any exhibitor in the City of Greater New York not employing members of Local 306.

"2. Members of Local 306 shall not be required, directly or indirectly, to work with, handle or work upon film, which was not or is not to be handled, transported and projected in the City of Greater New York, solely by members of the International Alliance of Theatrical Stage Employes and Moving Picture

Machine Operators of the United States and Canada, or its subsidiary locals, or the members of such union as is approved by the International Alliance, and which is recognized by one of the Central Organizations with which Local 306 is affiliated.

“3. * * * Employer further agrees that the agency which delivers the film shall not be required to deliver and need not deliver film to any exhibitor within the City of Greater New York who does not employ and continue to employ as projectionists solely members of Local 306.

“4. Employer agrees that film bearing the label of the International Alliance will be supplied for exhibition in the City of Greater New York only to such exhibitors as employ and continue to employ as projectionists solely members of Local 306” [69].

IATSE THREATS TO LOEW'S INCORPORATED.

“The complaint then alleges that at conferences between representatives of plaintiff and Local 306, plaintiff was told that it must immediately comply with the terms and conditions set forth in the letter of December 11, 1941 or else Local 306 would immediately call out on strike its members who are employed as projectionists in plaintiff's home office and New York film exchange, and upon the request of Local 306, to be made immediately, 'IATSE' will call out on strike all the members of Local 306 who are employed as projectionists in plaintiff's sixty-five theatres in Greater New York City, all members of Local B 51 employed in plaintiff's New York exchange and all members of any affiliated unions of 'IATSE' who are employed in plaintiff's studio at Culver City, California.”

IATSE THREATS TO OTHER COMPANIES.

“Plaintiff alleges that if these threats are carried out, and strikes take place pursuant to such threats, the business of plaintiff in all its branches, *i. e.*, production, distribution, and exhibition of motion pictures, will be seriously and irreparably damaged and injured and will come to a standstill resulting in a loss of many millions of dollars. It is also alleged that the defendant Local 306 and ‘IATSE’ have advised plaintiff that similar demands will be made upon the other seven distributors and strikes will also be called against all of their operations in the event that they fail to comply.

“Plaintiff alleges that it has no remedy or relief and will suffer irreparable injury, unless the relief sought herein is granted, and to comply with Local 306’s demands would result in plaintiff’s interference with internal management of the business of the independent exhibitors and will require plaintiff to break and violate the license agreement, thereby subjecting it to claims and damage suits; that compliance with Local 306’s demands will also result in a violation of the consent decree, referred to, and that every step and portion of plaintiff’s business is in interstate commerce, including the licensing and distribution of motion pictures.” [69]

LOEW’S INCORPORATED SOUGHT FEDERAL DECLARATORY RELIEF.

“The complaint seeks a declaratory judgment pursuant to Section 274d of the Judicial Code, 28 U. S. C. A., §400; (a) that the demands of the defendant are illegal and contrary to law and compliance therewith by plaintiff is prohibited by law; (b) that in making these demands, defendant is not, and in enforcing said demands by strikes

or other means of economic compulsion, defendant would not be a person participating in a labor dispute within the meaning of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. A. §§101-115; (c) that a contract between plaintiff and defendant which would include the terms and conditions set forth in defendant's letter of December 11, 1941, would be a contract in restraint of trade in violation of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. A., §1; (d) that compliance with defendant's demand would be a violation of the consent decree in *United States v. Paramount Pictures Inc.*, and (e) that if all of the distributors would comply with defendant's demands, a conspiracy would result which would constitute a violation of the Sherman Anti-Trust Act. 26 Stat. 209, 15 U. S. C. A., §1." [69, 70].

COURT FOUND ACTUAL CONTROVERSY EXISTED.

"There appears to be a very real controversy, since plaintiff alleges that if it complies with defendant's demands, it will be violating the law and defendant contends that the coercive action it intends to take is entirely legal and proper." [70].

COURT FOUND COMPANIES ENGAGED IN INTERSTATE COMMERCE.

"I am of the opinion that paragraphs 6, 7 and 33 of the complaint sufficiently allege the effect of defendant's acts upon interstate commerce. The business of plaintiff, a film distributor, is clearly interstate and the fact that the films stop at the exchanges prior to their shipment to the exhibitor does not deprive them of their interstate character. *Binderup v. Pathe Exchange*, 263 U. S. 291, 309. 44 S. Ct. 96, 68 L. Ed. 308." [70].

“The complaint plainly alleges that if plaintiff complies with defendant’s demands, the exhibitors will be put out of business and if it fails to comply, the defendant’s threatened action will stop all production, distribution and exhibition of motion pictures in the United States by plaintiff. See *Anderson v. Shipowners, Ass’n of Pacific Coast*, 272 U. S. 359, 363, 47 S. Ct. 125, 71 L. Ed. 298, where it was held that failure to allege that a combination was formed for the purposes of defeating the right of freedom to trade was immaterial, where such was the direct and necessary consequence of the combination and the acts done thereunder.” [70].

COURT FOUND ATTEMPTED BOYCOTT AGAINST
INDEPENDENT COMPANIES.

“In the case at bar, the employer-employee relationship has no bearing. Local 306 is attempting to compel plaintiff to force the independent exhibitors whom plaintiff licenses, to employ only members of Local 306 in its projection rooms. It is in the nature of a reverse secondary boycott, where the union, instead of attempting to coerce the retailer who carries non-union goods, here attempts to coerce the distributor of union goods to stop furnishing said materials to non-union customers.” [71].

COURT FOUND IATSE DEMANDS WOULD VIOLATE
SHERMAN ACT.

“I believe that such a contract as is proposed by defendant would be subject to the condemnation of *United States v. Brims*, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403, where it was held that a combination between a union and a non-labor group to eliminate the competition of non-union products constituted a violation of the Sherman

Act. This situation was expressly excluded from the immunities granted to labor by the Norris-LaGuardia Act in *United States v. Hutcheson*, *supra*, 312 U. S. at page 232, 61 S. Ct. 463, 85 L. Ed. 788. The effect of plaintiff's compliance with the demands of Local 306 would be to eliminate from the motion picture exhibition business all exhibitors who do not employ members of Local 306. The result would be that all competition, with respect to the exhibitors who did not employ members of Local 306, would be eliminated and no projectionist would be able to obtain a position, except those who are members of Local 306. The fact that plaintiff is being coerced by threat of financial ruin into such an agreement does not make it any the less an agreement between a labor and a non-labor group to eliminate the competition of theatres which were either not unionized or whose projectionists were not members of Local 306, within the condemnation of *United States v. Brims*, *supra*, and the explicit remarks of the court in *United States v. Hutcheson*, *supra*, where it was said (312 U. S. at page 232, 61 S. Ct. at page 466, 85 L. Ed. 788): 'So long as a union acts in its self-interest and does not combine with non-labor groups * * *.'

COURT FOUND PUBLIC INTEREST INVOLVED.

"Furthermore, the effect of such action as the union threatens would be to cut off the entire supply of motion pictures all over the country in the event that plaintiff fails to comply." [72].

COURT DENIED MOTION TO DISMISS DECLARATORY SUIT.

"Accordingly, defendants motion is denied in all respects. * * *." [72].

No. 11653

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Appellees.

Answering Brief of Appellees International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, and Richard F. Walsh, and Roy M. Brewer.

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No. 11653

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Appellees.

Answering Brief of Appellees International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, and Richard F. Walsh, and Roy M. Brewer.

To the United States Circuit Court of Appeals, in and for the Ninth Circuit, and to the Honorable Justices Thereof:

Respondents respectfully submit to this Honorable Court that the decision of the District Court of the United States, Southern District of California, Central Division, No. 6063BH Civil, dismissing the amended complaint of the appellants and rendering judgment of dismissal on January 27, 1947, on the ground that that Court lacked jurisdiction, was entirely without error, and followed sound and well settled legal principals.

STATEMENT OF FACTS.

There appears from the amended complaint, when the amazing number of legal conclusions therein are disregarded, that a jurisdictional controversy existed between the United Brotherhood of Carpenters and Joiners of America (Carpenters), of which appellants are members and of which the persons whom they purport to represent in this action are likewise members, and the appellee, International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada [Amended Compl., par. XII, Tr. p. 8], hereinafter referred to as the "International Alliance." Each organization claimed jurisdiction of the erection of sets in the Hollywood studios. [*Ibid.* pars. XXIII, XXIV, XXV, Tr. pp. 14-17.] In 1945, and again in 1946, the organization, of which plaintiffs are members, and the persons whom they claim to represent in this action engaged in a jurisdictional strike. [*Ibid.* par XIX, Tr. pp. 12-13; *Ibid.* par. XX, Tr. p. 13.] The strike in 1945 was terminated by an agreement referred to in the amended complaint as the "Cincinnati Agreement." [*Ibid.* par. XX, Tr. p. 13.] By its terms the jurisdictional controversy in the Hollywood studios was submitted to arbitration to a three-man committee appointed by the Executive Council of the American Federation of Labor, and consisting of three vice-presidents thereof. [*Ibid.* par. XXII, Tr. p. 14.] It was agreed by all parties thereto—the Motion Picture Companies and the International Labor organizations involved—that the decision of this committee should be "final and binding." [*Ibid.* par. XIX, Tr. pp. 12-13.] By the terms of the committee's decision [Exhibit "D" attached to the amended complaint], some of the labor organizations both won and lost certain jurisdiction.

and others lost without winning jurisdiction. Jurisdiction over the erection of sets was awarded to the appellee, International Alliance. [*Ibid.* par. XXIII, Tr. pp. 14-15.] The award went into effect in January, 1946. Ever since that time the International Alliance has had and now exercises jurisdiction over the erection of sets. [*Ibid.* pars. XXIV, XXV, XXVI, Tr. p. 16-17.] The carpenters and the appellants speaking for them, claim that the committee in August, 1946, issued a "Clarification Statement" by the terms of which jurisdiction of erection of sets was given to the carpenters. [*Ibid.* par. XXVII, Tr. pp. 17-18.] The foregoing matters are related in the allegations of appellants' alleged first cause of action. The sole additional elements added by the second cause of action so called, of appellants, are allegations to the effect that the appellee, Motion Picture Companies and the appellee, Producers Companies entered into a "conspiracy" to deprive appellants of their jobs. That alleged cause of action reveals further that the genuineness of the so-called clarification statement is in dispute. [*Ibid.* par. VII, Tr. pp. 25-26.]

Accordingly, the sole controversy set forth in the amended complaint is a jurisdictional dispute between two labor organizations arising out of a series of contracts, awards and decisions. In the language of Paragraph XII of the amended complaint itself,

"The controversy alleged herein involves the allocation of labor to be performed for defendant Motion Picture Companies by members of respective defendant unions under the terms and provisions of contracts entered into and executed by and with said company defendants and defendant Producers Association, and under agreements and decisions, findings and

awards heretofore arrived at in pursuance to arbitration agreements made and entered into by all defendants herein.”

In the further language of the lower court,

“The forty-eight page complaint when analyzed presents nothing more or less than a request that this court interpret a private contract or agreement allocating certain work on stage sets in the moving picture industry. As stated by counsel in oral argument, the difference between the parties is simply who is ‘to drive the nails.’ The serious question before the court is whether this court has jurisdiction in the absence of diversity of citizenship.” [Tr. p. 122.]

The amended complaint fails to allege diversity of citizenship, and affirmatively reveals that such diversity did not exist. The appellants contended below, however, that despite such lack of diversity of citizenship,

“Jurisdiction of this Court is vested by virtue of Sec. 400, Title 28, United States Code Annotated; Sec. 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Sec. 729, Title 28, United States Code Annotated; Sections 43 and 47 (3), Title 8, United States Code Annotated; Sec. 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV.” [See Amended Complaint, par. VIII, Tr. p. 7.]

Appellees filed motions to dismiss below, and voluminous Points and Authorities with respect to those motions were filed, both by respondents and appellants. On February 25, 1947, the Honorable Ben Harrison rendered judgment of dismissal on the ground that the court lacked jurisdiction, and filed its opinion reported in 70 Fed. Supp. 1008. [Tr. p. 122.] This appeal is taken by appellants from that judgment.

I.

Jurisdiction Was Not Conferred Upon the District Court Either by the V or the XIV Amendment to the Federal Constitution Nor by the Civil Rights Statutes Enacted Pursuant to the XIV Amendment, for Those Amendments Are Applicable Solely to Federal and State Action, Respectively.

Authorities:

Corrigan v. Buckley, 271 U. S. 323, 330;

Nissen v. International Brotherhood of Teamsters, etc., et al., 229 Iowa 1028, 296 N. W. 848, 141 A. L. R. 598, 614;

The Civil Rights Cases, 100 U. S. 313;

Virginia v. Rives, 100 U. S. 313;

U. S. v. Harris, 106 U. S. 629, 639;

Section 43, Title 8, U. S. C. A.;

Section 41(14), Title 28, U. S. C. A.;

Section 729, Title 28, U. S. C. A.;

California Oil & Gas Co. v. Miller, 96 Fed. 12, 22;

Section 47(3), Title 8, U. S. C. A.;

Section 41(12), Title 28, U. S. C. A.;

Love v. Chandler, 124 F. (2d) 785, 786, 787;

Simpson v. Geary, 204 Fed. 507;

Mitchell v. Greenough (C. C. A. 9), 100 F. (2d) 184, 187;

Bartling v. C. I. O., 40 F. Supp. 366, 368;

Love v. United States, 108 F. (2d) 43;

- Green v. Elbert, et al.*, 63 Fed. 308, 309;
Brents v. Stone, et al., 60 F. Supp. 82, 84;
Emmons v. Smitt, et al., 58 F. Supp. 869, 873, 874,
876;
Douglas v. City of Jeannette, 319 U. S. 157, 63
S. Ct. 877, 87 L. Ed. 1324, 1327.

**A. The Fifth Amendment to the Federal Constitution Is
Applicable Solely to Federal Action.**

Appellants first contend on page 30 of their opening brief that the complaint herein alleges facts constituting a violation of the Fifth Amendment to the Federal Constitution. With respect to that Amendment, however, it has long been settled that it is a limitation only upon the Federal government and does not limit individual action. In the language of *Corrigan v. Buckley*, 271 U. S. 323, 330:

“The Fifth Amendment ‘is a limitation only upon the powers of the general government,’ *Talton v. Mayes*, 163 U. S. 376, 382, 41 L. Ed. 196, 198, 16 Sup. Ct. Rep. 986, and is not directed against the action of individuals.”

The sole case relied upon by appellants in support of their contention that the allegations to the complaint are sufficient to show a violation of the Fifth Amendment to the Federal Constitution is *Nissen v. International Brotherhood of Teamsters, etc., et al.*, 229 Iowa 1028, 296 N. W. 858, 141 A. L. R. 598, 614. The *Nissen* case, however, concerns a proceeding by an expelled mem-

ber of a labor organization. Language quoted from that opinion at page 30 of appellants' opening brief upon which appellants rely in making the foregoing contention is of little authority in view of the rule to the contrary well established by decisions of the United States Supreme Court.

**B. The Fourteenth Amendment to the Federal Constitution
Likewise Applies Solely to State Action.**

On page 48 of their opening brief, the Fourteenth Amendment to the Federal Constitution is also relied upon by appellants. It was early settled in *The Civil Rights Cases*, 109 U. S. 3, however, that the Fourteenth Amendment did not apply to individual action, but applied solely to State Action. In the language of the United States Supreme Court in that decision,

“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment”

Similarly, in *Virginia v. Rives*, 100 U. S. 313, in referring to Section 1 of the 14th Amendment the court stated at page 318 that

“The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals.”

See, also:

U. S. v. Harris, 106 U. S. 629, 639.

The complaint here under consideration, does not in any manner, of course, suggest the presence of State Action.

C. The Civil Rights Statutes Enacted After the Civil War to Enforce the Provisions of the Fourteenth Amendment Apply to State Action Solely, or to Action Done Under Color of State Law.

(1) SECTION 43 OF TITLE 8, U. S. C. A. BY EXPRESS PROVISION IS LIMITED TO ACTION UNDER COLOR OF STATE LAW.

In Paragraph VIII of their complaint, appellants allege that, among other provisions, "Jurisdiction of this Court is vested by virtue of . . . Section 43 . . . Title 8, United States Code Annotated." That provision is as follows:

"Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress: R. S. 1979."

There is not the slightest intimation in the amended complaint or elsewhere, however, that appellees or any of them acted under color of state law. In the language of *California Oil & Gas Co. v. Miller*, 96 Fed. 12, 22,

"The liability declared in said section 1979, 8 U. S. C. A. 43 for depriving a person of rights, privileges, or immunities secured by the constitution and laws of the United States manifestly depends upon the fact that such deprivation be under color of some statute, ordinance, etc., of a state or territory; and

therefore, to constitute a cause of action under said section, the plaintiff must show, as part of his case, that the defendant claims to act under color of a statute, ordinance, etc., of a state or territory.”

(2) SECTION 47(3) OF TITLE 8, UNITED STATES CODE ANNOTATED, LIKEWISE APPLIES ONLY TO STATE ACTION, AS CONTRASTED TO INDIVIDUAL ACTION.

Appellants contend further that jurisdiction was vested in the lower court by virtue of Section 47(3), Title 8, United States Code Annotated, and Section 41(12), Title 28, U. S. C. A. (See Op. Br. pp. 4-5.)

Section 41(12), Title 28, gives jurisdiction to the Federal District Courts:

“Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in Section 47 of Title 8.”

The foregoing statutes, however, were passed shortly after the Civil War and has been construed, as was the Fourteenth Amendment, to provide for redress against State action and not against the invasion of private rights by individuals. These principles and the authorities establishing them are summarized in *Love v. Chandler*, 124 F. (2d) 785 at 786-787:

“The appellant contends that his complaint states a claim under Sec. 47(2) and (3) of Title 8, U. S. C. A., authorizing actions for damages for con-

spiracies to deprive citizens of the equal protection of the laws or from exercising any right or privilege as a citizen of the United States, and that it also states a claim under Sec. 48 of Title 8, U. S. C. A., which authorizes the recovery of damages from any person who, having knowledge of such a conspiracy and the power to prevent it, neglects or refuses so to do. The appellant further contends that the trial court had jurisdiction of the subject matter of this action by virtue of Sec. 41(12), (13) and (14) of Title 28, U. S. C. A., which confer upon the District Courts of the United States jurisdiction of actions to recover damages for deprivation of rights in furtherance of such conspiracies as are described in Sec. 47 of Title 8, U. S. C. A.

“The trial court was of the opinion that, since this Court had held in *Love v. United States*, 108 F. (2d) 43, 49, that the right of the appellant to be employed by the Works Progress Administration was not an absolute right conferred by the Constitution or laws of the United States and that the District Court was without jurisdiction to review the administrative action of which the appellant had complained in that case, the complaint in the instant action, under the rule announced in *Mitchell v. Greenough*, 9 Cir., 100 F. (2d) 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056, did not state a claim for damages resulting from a conspiracy to deprive the appellant of any right or privilege dependent upon a law of the United States.

“The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in

the enforcement of the Thirteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. [Citing cases.] The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. [Citing cases.] The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (*United States v. Mosley*, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355), *did not have the effect of taking into federal control the protection of private rights against invasion by individuals.*¹ [Citing cases.] The protection of such rights and redress for such wrongs was left with the States. [Citing cases.]

“The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that *he had no absolute* right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages because certain persons, as individuals, have allegedly conspired to

¹All italics in this brief are ours, unless otherwise noted.

injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and *interference with his efforts to obtain and retain employment with the Works Progress Administration*. The protection of the rights allegedly infringed and redress for the alleged wrongs are, we think within the exclusive province of the State. [Citing cases.] We agree with the trial court that the appellant has failed to state a claim upon which relief could be granted under the statutes which he has invoked. His complaint was properly dismissed.”

Similarly, in *Simpson v. Geary*, 204 Fed. 507, the plaintiffs contended that they were deprived of their right to work as brakemen and flagmen by reason of an Arizona law. In holding that no Federal jurisdiction could be invoked on the facts alleged in the complaint, the Court stated as follows:

“The right to contract for and retain employment in a given occupation or calling is not a right secured by the Constitution of the United States, nor by any Constitution. It is primarily a natural right, and it is only when a state law regulating such employment discriminates arbitrarily against the equal right of some class of citizens of the United States, or some class of persons within its jurisdiction, as, for example, on account of race or color, that the civil rights of such persons are invaded, and the protection of the federal Constitution can be invoked to protect the individual in his employment or calling.”

Similarly, in *Mitchell v. Greenough* (C. C. A. 9), 100 F. (2d) 184, 187, this Court, in construing 8 U. S. C. A. 47, stated as follows:

“The prohibition against ‘denial of the equal protection of the law’ was to prevent class legislation or action.”

Appellants rely, on page 53 of their brief, on *Picking v. Pennsylvania Railroad Company*, 151 F. (2d) 240. It is difficult to observe what bearing the *Picking* case has upon the issues here presented. In that case, the Court specifically took judicial notice that certain of the defendants were acting as officials of the State of New York and of Pennsylvania. During the occurrence of acts alleged in the complaint, and having taken such notice, the court held that plaintiffs had alleged a cause of action within the meaning of 8 U. S. C. A., Sec. 43, providing that:

“Every person who, *under color* of any statute, ordinance, regulation, custom or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law”

In the present case, as previously noted, no allegation whatsoever exists in the complaint and no factual situation exists of which the Court could take judicial notice that the defendants or any of them are acting “under color of any statute, ordinance, regulation, custom or usage of any state.”

At pages 55 and 56 of their brief, appellants cite *Bartling v. C. I. O.*, 40 Fed. Supp. 366, and rely upon language in that case such as the following taken from 40 Fed Supp. 366, 369:

“. . . whenever a Federal question is involved, such as to wit: the right to work.”

A close reading of the *Bartling* case will reveal that it is difficult to ascertain exactly what was the decision there made. Thus, at 40 Fed. Supp. 366, 368, the Court stated as follows:

“Third, that where action is against the union and there is a federal right involved, it cannot be of such a frivolous nature as seemingly injected solely for the purpose of acquiring jurisdiction. (Levering, *supra*.) There must be a meritorious federal question otherwise the whole case falls.

“But this court is not now convinced that all avenues of approach on this debatable issue have been exhausted and it must not be taken for granted that denial of defendants’ motions determines in any way the merits of the action itself. The holding merely means that this court believes that plaintiffs have established a primary right to be heard in this forum.”

If it be assumed that the Court intended to hold in the *Bartling* case that, irrespective of the lack of existence of any state action or any action under color of any state law, the bare right to work presents a federal

question, the decision is directly contrary to the holding in *Simpson v. Geary*, *supra*, 204 Fed. 507, and likewise is directly contrary to the holding in *Love v. Chandler*, *supra*, 124 F. (2d) 785, 786-787.

A further lengthy dissertation in accord with the *Chandler* decision will be found in *Love v. United States*, 108 F. (2d) 43, 45-6, the companion case of *Love v. Chandler*, *supra*.

Finally, at pages 56 and 57 of their opening brief, appellants rely upon *Douglas v. City of Jeanette*, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, 1327. It is unnecessary in order to point out the complete lack of applicability of the *Douglas* case to look further than to the quotation from that case set forth in appellants' brief to the effect that,

“In substance, *the complaint alleges that respondents, proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and the complaint seeks equitable relief from such deprivation in the future.*”

In the present case, the complaint alleges no ordinance or State or Federal law whatsoever under which the defendants or any of them acted, and accordingly the provisions of 8 U. S. C. A. Sec. 43, upon which jurisdiction rested in the *Douglas* case, are clearly inapplicable.

II.

The Federal Declaratory Judgment Act Did Not Add to the Jurisdiction of the Federal Courts, but Merely Provided an Additional Remedy Within the Framework of the Previously Existing Federal Jurisdiction.

Authorities:

Aetna Casualty & Surety Co. v. Quarles, 92 F. (2d) 321, 323, 324;

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000);

Peoples Bank v. Eccles, 64 Fed. Supp. 811;

Mississippi Power & Light Co. v. City of Jackson, et al., 116 F. (2d) 924;

Oil Workers International Union, etc. v. Texoman Natural Gas Co., 146 F. (2d) 62;

Code of Civil Procedure of the State of California, Section 1060;

Columbia Pictures Corp. v. DeToth, 26 Cal. (2d) 753, 756;

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66.

Appellants next contend on pages 31 to 38 of their opening brief that the District Court had jurisdiction by virtue of the provisions of the Federal Declaratory Judgment Act (Section 400, Title 98, U. S. C. A.). It is settled, however, that that Act added nothing to the jurisdiction of the Federal Courts and that diversity of citizenship or some other previously established basis for federal jurisdiction must exist even though the provisions of the Federal Declaratory Judgment Act are otherwise ap-

plicable. In the language of *Aetna Casualty & Surety Co. v. Quarles*, 92 F. (2d) 321, 323-4, "The federal Declaratory Judgment Act (Jud. Code Sec. 274d, 23 U. S. C. A. Sec. 400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction." Indeed, were Congress to attempt to expand the jurisdiction of the federal courts beyond the limits placed thereupon in the Federal Constitution, such attempted expansion would be unconstitutional and void. (See *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000.)

The authorities holding that the federal Declaratory Judgment Act did not confer additional jurisdiction on the federal courts are numerous and uniform:

Smith v. Blackwell, 34 Fed. Supp. 989, affirmed 115 F. (2d) 186;

Corcoran v. Royal Development Co., 35 Fed. Supp. 400; affirmed 121 F. (2d) 957; certiorari denied 62 S. Ct. 360, 314 U. S. 691, 86 L. Ed. 552;

Aetna Casualty & Surety Co. v. Quarles, 92 F. (2d) 321;

Samuel Goldwyn, Inc. v. United Artists Corporation, 113 F. (2d) 703;

McCarty v. Hollis, 120 F. (2d) 540;

Miles Laboratories v. Federal Trade Commission, 50 Fed. Supp. 434; affirmed 140 F. (2d) 683; certiorari denied 64 S. Ct. 1263; 322 U. S. 751, 88 L. Ed. 1582;

Home Ins. Co. of New York v. Trotter, 130 F. (2d) 800;

F. W. Maurer & Sons Co. v. Andrews, 30 Fed. Supp. 637;

Continental Casualty Co. v. National Household Distributors, 32 Fed. Supp. 849;

Koon v. Bottolfsen, 60 Fed. Supp. 316;

Duart Mfg. Co. v. Philad Co., 31 Fed. Supp. 548.

Innumerable cases uniformly so holding are to be found in the annotations to Title 28, Section 400, U. S. C. A., in the 1946 Pocket Supplement at pages 244 to 246.

Appellants rely on *Peoples Bank v. Eccles*, 64 Fed. Supp. 811, at pages 31 and 32 of their opening brief, and stress language in that case to the effect that the Federal Declaratory Judgment Act "should be liberally construed in accordance with the general canon of statutory construction applicable to remedial statutes." Patently, the Court in the *Eccles* case, in making the foregoing observation, had reference solely to the necessity for liberality in the interpretation of the remedial provisions of the Act in order that the Act may more expeditiously perform its intended purpose. That such was the intent of the Court is indicated beyond question by the Court's reliance in making the foregoing comment on *Mississippi Power & Light Co. v. City of Jackson, et al.*, 116 F. (2d) 924. At pages 32 and 33 of appellants' opening brief, quotations are made at length from the *Mississippi Power & Light Company* case. No necessity exists for going beyond the quotations thus given to reveal that that decision expressly recognized that, although the remedial provisions of the Declaratory Judgment Act are to be liberally construed, that Act did not add to the jurisdiction of the Federal Courts. In the language of that decision at 116 F. (2d) 924, 925, as quoted on pages 32 and 33 of

appellants' opening brief, "Plaintiff is here challenging the order as entered erroneously, *because its complaint showed the requisite diversity of citizenship and jurisdictional amount . . .*"; "*While the declaratory judgment act has not added to the jurisdiction of the federal courts, it has added a greatly valuable procedure of a highly remedial nature.*" It need only be observed here again that in the present case the complaint not only fails to allege diversity of citizenship, or any other basis for federal jurisdiction, but affirmatively reveals that diversity of citizenship did not exist.

Similarly, in relying on *Oil Workers International Union, etc. v. Texoman Natural Gas Co.*, 146 F. (2d) 62, at page 34 of their brief, appellants failed to include the statement of the court in that decision (146 F. (2d) 62, at 65), that "Where a justiciable controversy exists *between citizens of different states* with regard to rights having a value in excess of \$3,000.00, *as here*, the United States District Courts are vested with jurisdiction."

On pages 35-36, appellants quote section 1060 of the Code of Civil Procedure of the State of California, and cite *Columbia Pictures Corp. v. DeToth*, 26 Cal. (2d) 753, 756, a decision of the Supreme Court of California interpreting that code section. It is not apparent what bearing either the said code section or that decision have on the issue here presented, that of federal jurisdiction in the absence of diversity of citizenship.

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66, cited at pages 37-38 of appellant's opening brief, has no bearing whatsoever on the contention of appellant's that the federal declaratory relief act eliminates the necessity for diversity of citizenship in all cases falling within the scope of its provisions.

III.

The Court Had No Jurisdiction Herein by Virtue of Any of the Provisions of the National Labor Relations Act.

Authorities:

U. S. C. A., Title 29, Section 150;

U. S. C. A., Title 29, Section 157;

U. S. C. A., Title 29, Section 160(a);

Blankenship v. Kurfman (C. C. A. 7), 96 F. (2d) 450;

United Electrical, etc., Workers v. I. B. of E. Workers, 115 F. (2d) 488, 489, 491, 492;

Lund v. Woodenware Workers Union (D. C. Minn), 19 F. Supp. 607;

U. S. C. A., Title 29, Sections 151-166;

Fur Workers Union, etc. v. Fur Workers Union, 105 F. (2d) 1, 12; affd. 308 U. S. 522, 84 L. Ed. 443;

Steele v. Louisville and Nashville, etc., 323 U. S. 192, 89 L. Ed. 173 (see Op. Br. pp. 49, 53);

Tunstall v. Brotherhood of Locomotive Firemen, etc., 323 U. S. 210, 89 L. Ed. 187;

Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 99 F. (2d) 309, 315;

Yoerg Brewing Co. et al. v. Brennan, et al., 59 Fed. Supp. 625, 632.

On pages 39 to 51 of their opening brief, appellants seek to establish that the Court had jurisdiction on the ground that this case arises under the constitution and laws of the United States in that it arises under the National Labor

Relations Act. (29 U. S. C. A. Sec. 150 *et seq.*) Plaintiffs rely upon section 7 of the N. L. R. A. (Section 157 of Title 29, U. S. C. A.) on page 39 of their brief, which section provides as follows:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection.”

The Complaint herein, however, does not allege any violation of the foregoing section. Even if it be assumed that the Complaint did allege such a violation, the United States District Court would yet be without jurisdiction, for the National Labor Relations Act provides that the National Labor Relations Board shall have exclusive power to enforce rights guaranteed by that Act to employees, subject only to review by the Circuit Court of Appeals. Thus Section 10(a) of the National Labor Relations Act (29 U. S. C. A., Sec. 160(a)) provides as follows:

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.”

It is settled, moreover, that rights and obligations of employers and employees under executed labor agreements do not arise under the National Labor Relations Act within the meaning of Article 3, Section 2, Subdivision 1 of the Federal Constitution, even though such agreements were

arrived at in conformity with the agreements of that Act. The Act does not provide for the interpretation or enforcement of agreements, but provides only for negotiations in good faith looking to agreements. Thus, *Blankenship v. Kurfman* (C. C. A. 7), 96 F. (2d) 450, involved an action by members of a union to enjoin another union from interfering with a contract between their union and their employer. With respect to the contention of the plaintiffs that federal jurisdiction was present on the ground that the case arose under the provisions of the National Labor Relations Act, the court held as follows:

“The proposition of the plaintiffs that the effect of the National Labor Relations Act, especially Sections 157 and 159(a) of Title 29 U. S. C. A., is to create a federal right, the violation of which by the defendants entitles plaintiffs to injunctive relief, is untenable.

. . .

“The general purpose of the National Labor Relations Act is to provide methods of preventing or eliminating certain ‘unfair practices’ which have heretofore characterized the relation of employer and employee, and which have obstructed, or tended to obstruct, the free flow of commerce. The act creates certain rights and duties as between employer and employee and provides the procedure necessary to give effect thereto. *It seems clear that the only rights which are made enforceable by the Act are those which have been determined by the National Labor Relations Board to exist under the facts of each case; and when these rights have been determined, the method of enforcing them which is provided by the Act itself must be followed. And we find no provision in the Act which can be construed as intending to create rights for employees which can be enforced in federal courts in-*

dependently of action by the National Labor Relations Board. Consequently, we hold that the contract in the instant case between the plaintiffs and their employer did not, by force of the National Labor Relations Act, create a right in the plaintiffs which was secured to them 'By the Constitution or laws of the United States.' Consequently, the alleged unlawful interference by the defendants with the plaintiffs' contractual rights did not give a cause of action of which a federal court would have jurisdiction in the absence of diversity of citizenship."

Similarly, that a controversy between two competing labor unions based upon an alleged violation of one of the union's right of collective bargaining secured by Section 7 of the National Labor Relations Act, being Section 157, Title 29, U. S. C. A., does not "arise under the * * * laws of the United States" is clearly set forth in an opinion by that distinguished jurist, "Judge Learned Hand, Senior Circuit Judge, Circuit Court of Appeals, Second Circuit in *United Electrical, etc. Workers v. I. B. of E. Workers*, 115 F. (2d) page 488. From that opinion, we quote as follows from pages 489, 491 and 492 in Appendix "A" of this brief, reference to which is herewith made.

Again in *Lund v. Woodenware Workers Union* (D. C. Minn.), 19 Fed. Supp. 607, the Court had before it an action brought by the employer to restrain a minority group who were on strike and by acts of violence and intimidation were preventing the majority of the employees from working, resulting in the closing of plaintiff's factory. In accordance with the terms of the National Labor Relations Act, and particularly Section 157, Title 29, above quoted, plaintiff had entered into a contract with the duly elected bargaining agent of his employees. The primary

question before the Federal Court in that action was whether the Federal Court had jurisdiction. The Court said

“plaintiff seeks to invoke the jurisdiction of this Court on the theory that, when the majority of the employees have elected their representatives for collective bargaining and a bargain is so made by them with the employer, the Wagner-Connery Labor Relations Act, 29 U. S. C. A., Sections 151-166, makes unlawful any course of conduct by the minority employees which tends to interfere with the agreement.

. . .

“There is no intimation in the Act, that, merely because an employer has entered into a contract with a majority union, Congress assumed to vest jurisdiction in the United States Courts to protect or safeguard the integrity of such contract. In fact, it seems reasonably clear that Section 159(a), 29 U. S. C. A., does not necessarily contemplate the making of a contract between the employer and employees, nor does it seek to compel an employer to make any contract with the designated representatives of the majority.” (In support of the foregoing, the Court quotes from the opinion of Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 57 S. Ct. 615.)

The relative jurisdictions of the Courts and the National Labor Relations Board under the provisions of the N. L. R. A. are expressed clearly and at length by Justice Stephens speaking for the United States Court of Appeals for the District of Columbia in *Fur Workers Union etc. v. Fur Workers Union*, 105 F. (2d) 1 at 12 (affirmed by the Supreme Court at 308 U. S. 522, 84 L. Ed. 443).

Again, Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, in *Donnelly Garment Co. v. International Ladies' Garment Workers' Union*, 99 F. (2d) 309 at 315, said:

“It also seems clear to us that the only jurisdiction conferred by the National Labor Relations Act upon Federal Courts is that conferred upon Circuit Courts of Appeals with respect to enforcing, modifying and setting aside orders of the National Labor Relations Board.”

To the same effect is the language used in *Yoerg Brewing Co., et al. v. Brennan, et al.*, 59 Fed. Supp. 625 at 632 (decided on March 6, 1945):

“Summarizing our views, therefore, we are constrained to hold that the only jurisdiction conferred by the National Labor Relations Act upon the Federal Courts is that which is conferred upon the Circuit Courts of Appeals.”

Cases relied upon by plaintiffs are *Steele v. Louisville and Nashville, etc., R. R.*, 323 U. S. 192, 89 L. Ed. 173 (hereinafter called the *Steele* case) (see Op. Br. pp. 49, 53), a companion case to which is *Tunstall v. Brotherhood of Locomotive Firemen, etc.*, 323 U. S. 210, 89 L. Ed. 187 (hereinafter called the *Tunstall* case). None of these cases, it is respectfully submitted, even remotely suggests that this Court has jurisdiction of the controversy disclosed by the Amended Complaint.

In the *Steele* case, the question presented was stated by the Chief Justice in the opening paragraph of the opinion as follows:

“The question is whether the Railway Labor Act * * * imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, *the duty to represent all the employees in the craft without discrimination because of their race*, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.”

And in the *Tunstall* case the Chief Justice summarizes the questions involved in the following language:

“This is a companion case to No. 45, *Steele v. Louisville & N. R. Co.* decided this day * * * in which we answered in the affirmative a question also presented in this case. The question is whether the Railway Labor Act * * * imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft *without discrimination because of their race*. The further question in this case is whether the federal courts has jurisdiction to entertain a *non-diversity* suit in which petitioner, a railway employee subject to the Act, seeks remedies by injunction and awarded of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft *without discrimination because of race*.”

It is apparent that the controversy in the instant case bears no resemblance to the controversy decided by the Supreme Court of the United States in the *Steele* and *Tunstall* cases. In the present case, no complaint is made by the plaintiffs that the Carpenters' Union, their legally constituted bargaining agent under the provisions of the National Labor Relations Act [Paragraph XI, page 5 of the Amended Complaint], is discriminating against them or any minority group because of race, color, or for any other reason. In fact, according to allegations in the Amended Complaint, the plaintiffs and those whom they purport to represent are well satisfied with the "contracts, decisions, findings, and awards in arbitration" negotiated for them and on their behalf by their bargaining representative, the Carpenters' Union; there is, moreover, no controversy between the plaintiffs and any of their fellow members concerning the effectiveness, desirability, or meaning of such "contracts, decisions, findings, and awards in arbitration." The controversy here is not, as it was in the *Steele* and *Tunstall* cases, inter-racial, but is a controversy between competing unions as to the meaning and application of certain alleged "contracts, decisions, etc." In the instant case, plaintiffs and those whom they purport to represent desire that certain "contracts, decisions, etc.," be interpreted as they and all affiliated with them desire to have them interpreted in order that the Carpenters may have jurisdiction over the erection of sets, whereas the International Alliance and the Producers interpret the said "contracts, decisions, findings, and

awards in arbitration" [Par. XII, Amended Complaint, Tr. p. 8] as granting jurisdiction to the Internation Alliance over the erection of sets, and it is the latter interpretation which has been put into effect and has been in operation for the past year.

Appellants at page 51 of their brief set forth the conditions stated on emergency working cards issued by the Division of Set Erection, I. A. T. S. E. Local 468, during the existence of the emergency created by the jurisdictional strike brought by the plaintiffs. On page 52 of their brief, appellants make the following comment:

"It is respectfully submitted that the public interest, at this critical time in our country's history, requires a clear-cut, judicial determination that no industry is big enough, that no labor organization is strong enough, and that no combination is powerful enough, to nullify the laws of the United States.

Andrew Jackson put an end to nullification."

Appellants having failed utterly to make allegations sufficient even to indicate any violation whatsoever of the provisions of the National Labor Relations Act by the appellees, or by any of them, it is indeed difficult to perceive even the slightest basis that would justify the comment that the appellees are seeking "to nullify the laws of the United States." It is respectfully submitted that if "Andrew Jackson" was requested to "put an end" to the "nullification" here presented his task would indeed be a nonentity.

IV.

The Court Had No Jurisdiction Under the Allegations in the Complaint by Virtue of the Provisions of 28 USCA, Section 41(8) Granting the Federal Courts Jurisdiction of All "Suits and Proceedings Arising Under Any Law Regulating Commerce."

Authorities:

American Federation of Labor, et al. v. J. Tom Watson, et al., 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, 878;

Blankenship v. Kurfman (C. C. A. 7), 96 F. (2d) 450;

United Electrical, etc. Workers v. I. B. of E. Workers, 115 F. (2d) 488;

Lund v. Woodenware Workers Union (D. C. Minn.), 19 Fed. Supp. 607;

Fur Workers Union, etc. v. Fur Workers Union, 105 F. (2d) 1;

U. S. C. A., Title 29, Section 157;

U. S. C. A., Title 45, Section 152;

General Committee etc. v. Missouri-K.-T.-R. Co., 88 L. Ed. 76;

Delaware L. & W. R. Co. v. Slocum, 56 Fed. Supp. 634;

General Committee, etc. v. Southern Pacific Co., 320 U. S. 338, 88 L. Ed. 85.

On page 52 of their opening brief, appellants through a quotation from *American Federation of Labor, et al. v. J. Tom Watson, et al.*, *supra*, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, at 878, make the contention that the District Court had jurisdiction under the provisions of 28 U. S. C. A., Section 41(8), granting jurisdiction to Federal District Courts of all "suits and proceedings arising under any law *regulating* commerce." The controversy presented by the amended complaint herein, however, does not arise out of any law *regulating* commerce. The fact that a controversy may *affect* interstate commerce does not give the Federal District Courts jurisdiction of such controversy under Section 41(8) of Title 28. Decisions squarely to that effect are found in Point III, *supra*, of this brief. (See *Blankenship v. Kurfman* (C. C. A. 7), *supra*, 96 F. (2d) 450; *United Electrical etc. Workers v. I. B. of E. Workers*, *supra*, 115 F. (2d) 488; *Lund v. Woodenware Workers Union*, *supra* (D. C. Minn.), 19 Fed Supp. 607; *Fur Workers Union, etc. v. Fur Workers Union*, *supra*, 105 F. (2d) 1.) Additional compelling authority to the same effect may be found in decisions that an action for declaratory judgment as to rights under a contract executed as a result of negotiations under the Railway Labor Act is not an action arising under any federal statute, including the commerce clause. Decisions under the Railway Labor Act are clearly in point because that act, like the National Labor Relations Act, requires that negotiations be had for the purpose of arriving at a contract but does not command the making of a

contract. Thus, Section 7 of the N. L. R. A. (U. S. C. A., Title 29, Sec. 157) may be compared as follows with Section 4, R. L. A. (U. S. C. A., Title 45, Sec. 152):

<i>National Labor Relations Act, Section 7 (U. S. C. A., Title 29, Sec. 157):</i>	<i>Railway Labor Act, Section Fourth (U. S. C. A., Title 45, Sec. 152):</i>
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“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

“Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . .”

The decisions under the Railway Labor Act hereinafter discussed reveal without question that jurisdictional disputes between labor organizations, although involving contracts negotiated under the provisions of that Act, do not arise under the Commerce Clause. Thus, in *General Committee etc. v. Missouri-K.-T. R. Co.*, 320 U. S. 323, 88 L. Ed. 76, decided by the Supreme Court of the United States on November 22, 1943, it appeared that the National Mediation Board made a determination of a controversy between two unions of railroad employees as to which was the proper bargaining representative under the Railway Labor Act, and particularly with respect to the calling of engineers for emergency service. One of the labor unions, to-wit, Brotherhood of Locomotive Engineers, brought an action in the District Court of the United

States for the Northern District of Texas for declaratory relief, naming the employers and a competing union, the Locomotive Firemen and Enginemen, as parties thereto. The District Court dismissed the action and the Appellate Court, the Circuit Court of Appeals for the Fifth Circuit modified the judgment, and on writ of certiorari the Supreme Court of the United States reversed, stating "*we are of the view that the District Court was without power to resolve the controversy.*"

As appears from the opinion and as specifically stated therein by the Court, a jurisdictional controversy existed between the two unions with respect to jurisdiction over the calling of emergency engineers. A similar jurisdictional controversy exists in the instant case between the Carpenters and The Alliance over the work of erecting sets in the Hollywood Studios. The provisions of the National Labor Relations Act and the Railway Labor Act with respect to the application of the principles of collective bargaining are to the same effect and almost identical in wording. We quote from the opinion of the Supreme Court of the United States in the *General Committee etc.* case at pages 83 to 84 of 88 L. Ed. in Appendix "B" of this brief, reference to which is herewith made.

In *Delaware L. & W. R. Co. v. Slocum*, 56 Fed. Supp. 634, *supra*, the District Court for the Western District of New York in 1944 had before it an action filed by the employer against competing labor unions in which declaratory relief was sought, the employer desiring a judgment construing certain separate contracts between the employer and two labor organizations. Each of the labor organizations claimed jurisdiction over and the right to represent "crew callers" and insisted that under their respective contracts

with the employer each had jurisdiction over such classification of work. In the instant case, both the Carpenters' Union and The Alliance claim jurisdiction over Set Erectors. In both the instant case and in the *Slocum* case, the only question presented was a jurisdictional controversy between competing labor unions, each claiming the right, under contract with the employer, to represent a certain classification of employment; in the instant case—set erectors, in the *Slocum* case—crew callers. In the *Slocum* case, as in the instant case, each claimed to be the duly elected sole bargaining agent for the class of employees involved. Motions to dismiss were interposed upon the ground that the Court lacked jurisdiction. We quote from the opinion as follows:

“A suit does not arise under the laws of the United States unless it ‘really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends.’ [Citing cases.] It is patent from the complaint that this suit does not involve the ‘validity, construction or effect’ of any federal statute, *but rather seeks the determination of its rights or liabilities under certain contracts*. It has been urged that this is a suit for a violation of the commerce laws, 28 U. S. C. A., Sec. 41(8) and that this court has original jurisdiction. The nature of the suit is to be determined by the complaint [citing cases] and nothing therein reveals that the acts charged have any relation to the commerce laws. It is true that the plaintiff in the opera-

tion of its railroad was engaged in interstate commerce, *but the mere fact that interstate commerce may be affected is not sufficient to give jurisdiction in a private suit unless the suit directly concerns an Act of Congress.* [Citing cases.] THE ONLY ISSUE IS THE INTERPRETATION OF THE CONTRACTS.”

In *General Committee, etc. v. Southern Pacific Co.*, 320 U. S. 338, 88 L. Ed. 85, which is a companion case to *General Committee, etc. v. Missouri-K.-T. R. Co.*, *supra*, the Supreme Court of the United States at pages 87 and 88 of 88 L. Ed. has this to say concerning jurisdictional controversies between competing labor unions:

“We are concerned only with a problem of representation of employees before the carriers on certain types of grievances which, though affecting individuals, present a dispute like the one at issue in the *Missouri-Kansas-Texas R. Co.* case. *It involves, that is to say, a jurisdictional controversy between two unions.* It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. *It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins.* For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co. Case* and in the *Switchmen’s Union of N. A. Case*, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts. We see no reason for differentiating this jurisdictional dispute, from the others.”

It appears from the opinion in *American Federation of Labor v. J. Tom Watson, supra*, that the State of Florida adopted a Constitutional Amendment which was susceptible of an interpretation so as to outlaw closed-shop contracts in the State of Florida. Certain labor organizations and others filed an action in the District Court of the United States for the Southern District of Florida to “enjoin the enforcement of that provision” (the Section of the Constitutional Amendment which it was contended would make closed-shop contracts unlawful and provide criminal penalties for entering into them) “on the ground that it violated the First Amendment, Fourteenth Amendment, and the Contract Clause of Article I, Section 10 of the Federal Constitution *and was in conflict with the National Labor Relations Act*. As stated in the opinion “the theory of the bill is that the law in question outlaws any agreement which requires membership in a labor organization as a condition of improvement, all of which we refer to herein as the closed shop.” We quote from the opinion on pages 718-719-720-721 and 722 of 90 L. Ed., Advance Sheet No. 11, in Appendix “C” of this brief, reference to which is herewith made.

From the foregoing quotations, it clearly appears that if the Florida Constitutional Amendment under attack had been construed as outlawing the closed shop it would have been in conflict with the National Labor Relations Act, which permits employees through the duly designated or certified bargaining representatives to negotiate such con-

tracts and *might*, therefore, have been held to be unconstitutional. Whether it would or would not have been so viewed was not determined by the Supreme Court as the matter was referred back to await a determination by the Florida Supreme Court of the meaning of the amendment. That the District Courts of the United States have jurisdiction to determine the constitutionality, on the ground that it runs counter to the Constitution of the United States or valid federal laws enacted pursuant thereto, of a State Legislative Act or an Amendment to a State's Constitution is unquestioned; it was not questioned by anybody in the *Watson* case. Here, in the instant case, we are not concerned with any act, legislative or otherwise, of the State of California, nor of the conduct of any of its officers claiming to act under color of state law. We, therefore, repeat that in our opinion there is nothing in the *Watson* case which even remotely suggests that jurisdiction of the present controversy is vested in this Court.

V.

The Provisions of the Sherman Anti-Trust Act Are Entirely Foreign to the Allegations in the Amended Complaint Herein.

Authorities:

Pennsylvania R. Co. v. Public Utilities Com., 298 U. S. 170, 56 S. Ct. 687, 80 L. Ed. 1130;

Barnsdall Refining Corp. v. Cushman-Wilson Oil Co. (C. C. A., Iowa), 97 F. (2d) 481;

Missouri Valley Shoe Corp. v. Stout (C. C. A., Mo.), 98 F. (2d) 514;

Federal Rules of Civil Procedure, Section 75(3);

Rules of the U. S. Circuit Court of Appeals for the Ninth Circuit, Rule 202(b)(3);

U. S. C. A., Title 15, Section 1;

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66;

Allen Bradley Co., et al. v. Local Union No. 3 International Brotherhood of Electrical Workers, 325 U. S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939;

U. S. v. Hutcheson, 312 U. S. 219, 85 L. Ed. 788;

U. S. C. A., Title 29, Sections 101-115;

U. S. C. A., Title 15, Section 12;

U. S. C. A., Title 29, Section 52;

U. S. C. A., Title 15, Section 15;

Gerli v. Silk Ass'n of America, et al., 36 F. (2d) 959;

Westmoreland Asbestos Co. v. Johns-Mansville Corp., et al., 30 Fed. Supp. 389; adhered to on reargument 32 Fed. Supp. 731; affd. Circuit Court of Appeals 113 F. (2d) 114;

Corey v. Boston Ice Co., 207 Fed. 465;

Loeb v. Eastman Kodak Co., 183 Fed. 704;

41 C. J., 186;

Roseland v. Phister Mfg. Co., et al., 125 F. (2d) 417.

Neither in the Amended Complaint, nor in the “Jurisdictional Statement” appearing on pages 1 to 5, inclusively of appellants’ brief, nor in the paragraph headed “Jurisdiction” appearing on page 8 of said brief, nor in the Specifications of Error relied upon by appellants appearing on page 28 of their brief, nor in the Statement of Points Upon Which Appellants Intend to Rely on Appeal [see Tr. p. 136; see Federal Rules of Civil Procedure, Rule 75(d)], is there any suggestion made that the lower court had jurisdiction of this action on the ground that it was based, or that it even concerned in any manner the Federal Anti-Trust laws. In neither the oral argument, nor the written memorandum of Points and Authorities submitted to the lower court in argument on the Motion to Dismiss did appellants suggest that the Federal Anti-Trust Laws had anything to do with this litigation.

The first time in this action that such a suggestion was made is in its presentation before this court on pages 58 to 62 of appellants’ opening brief.

It is indeed unfair to the lower court to wait until decision has been rendered by that court and then to urge on appeal an entirely new point not revealed in either the pleadings or the arguments below. In Paragraph VIII of the Amended Complaint, appellants alleged the various statutory provisions upon which reliance was

made for the jurisdiction of the District Court. Nowhere in that paragraph or in any other paragraph in the Amended Complaint was any mention made of any provision of the Sherman Anti-Trust Laws.

That the lower court relied upon the basis for jurisdiction set forth by appellants is revealed in the opinion of that court in which the court stated as follows: "Since this is a court of limited jurisdiction, every case brought here must fall within the terms of a provision of some statute of the United States."

Plaintiffs allege (Paragraph VIII):

"Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code Annotated; Section 41(1), 41(8), 41 (12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV."

If the case does not fall within the terms of one or more of these statutes or amendments to the Constitution, the court must dismiss the action for want of jurisdiction.

It is settled that appellate courts frown, except in unusual cases, upon points raised for the first time on appeal, especially when the raising of such points require the adoption of an entirely new theory from that which was presented to the court below. (*Pennsylvania R. Co. v. Public Utilities Com.*, 298 U. S. 170, 56 S. Ct. 687, 80 L. Ed. 1130; *Barnsdall Refining Corp. v. Cushman-Wilson Oil Co.* (C. C. A., Iowa), 97 F. (2d) 481; *Missouri Valley Shoe Corp. v. Stout* (C. C. A., Mo.), 98 F. (2d)

514.) Moreover, in failing to set forth in their Statement of Points on Appeal [See Tr. p. 136], their new theory that the amended complaint herein falls within the provisions of the federal anti-trust laws, appellants have violated section 75(3) of the Federal Rules of Civil Procedure, which section provides as follows:

“(d) STATEMENT OF POINTS. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.”

Similarly, in failing to point out what provisions of the complaint set forth the allegations requisite to bringing the pleading within the scope of the federal anti-trust laws, appellants have violated Rule 202(b)(3) of the U. S. Circuit Court of Appeals—Ninth Circuit—appellate rules. Rule 202(b)(3) requires that the brief on appeal shall contain

“in order here stated— . . . (b) A statement of the pleadings and facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this court has jurisdiction upon appeal to review the judgment, decree or order in question. The statement *shall refer distinctly* . . . (3) To the pleadings necessary to show the existence of the jurisdictions, *referring to the pages of the record in which they appear.*”

In any event, again culling the factual allegations in the Amended Complaint from the conclusions of law therein set forth, no allegations whatsoever appear that would justify the conclusion that a cause of action had been

stated under the Sherman Anti-Trust Act. Section 1 of that Act (15 U. S. C. A., Sec. 1) provides as follows:

“Every contract, combination in the form of trusts or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal.”

There is no allegation in the Amended Complaint whatsoever that the defendants have done acts, “in restraint of trade or commerce among the several states.” The only reference to interstate commerce that appears in the Amended Complaint is found in Subparagraph 4 of Paragraph XXXIV [Tr. p. 21] in which the plaintiffs allege that the declaratory relief sought by them was the only remedy available to them “To maintain the continued and uninterrupted flow of interstate commerce in the motion picture industry under the good faith observance of said contract and arbitration determination.” This statement at best is a mere conclusion. It does not constitute an allegation that any conduct of the respondents resulted in restraint of trade or commerce among the several states. The statement certainly does not even remotely suggest a claim on the part of appellants that they were seeking declaratory relief under the sections of the Federal statutes relating to combinations and monopolies in restraint of trade. Certainly the quoted statement does not constitute an allegation that the “Flow of interstate commerce in the motion picture industry has been interrupted or not continued,” because others have been doing the carpentry work in the studios that appellants desired to do.

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66 relied upon at page 58 of appellants' brief and set forth

at length on pages 8 to 16 of the appendix to appellants' opening brief was a decision brought specifically under the provisions of the Sherman Anti-Trust Act, and an allegation to that effect was specifically set forth in the Complaint therein. The allegations made in the complaint concerned in the *Loew's* case upon which the court relied in holding that the Norris-LaGuardia Act, 29 U. S. C. A., Sections 101-115 did not remove the conduct of the defendants, as set forth in the complaint in that case, from the Sherman Anti-Trust law, are totally absent from the Amended Complaint herein concerned. In the *Loew's* case the complaint alleged that the defendant Labor Union, Local 306 made demand upon the plaintiff, Moving Picture Producers and Distributors that the plaintiff not only hire members of the defendant local in its own theatres and distributorship system, but that the plaintiff agree to distribute film only to those independent exhibitors that engaged projectionists solely from the membership of the defendant local. The complaint also alleged that the plaintiff had distributing contracts with a number of independent distributors, which said contracts would be violated by the plaintiff if the plaintiff complied with that demand of the defendant local. It was solely upon those allegations in the complaint, that is, the allegations that the defendant local was demanding of the plaintiff, and was attempting to enforce that demand by strikes and other weapons of labor, that the plaintiff agree to distribute to those independent exhibitors only who hire projectionists from the defendant local, that the court relied in the *Basson* case to hold that the Norris-LaGuardia Act did not remove the allegations of the complaint from the scope of the Sherman Anti-Trust Act.

That such was the basis of its decision is made clear by the court in 46 Fed. Supp. 66, 71-72,

“Examining the situation in the case at bar, it appears from the complaint that the parties originally entered into negotiations for a new contract with respect to the projection men employed by plaintiff at its home office and its New York exchange. These men, who were members of defendant Local 306, had been employed under a contract which had expired on August 30, 1940 and they had continued in plaintiff’s employ under the terms and conditions of said contract. Up to this point, there is clearly such a labor dispute as would necessitate the dismissal of this complaint.

“However, the Union (Local 306) then saw fit to inject a demand in their proposed contract which had nothing whatever to do with the terms and conditions of employment of these men. They then made a new and further demand upon plaintiff that it must refuse to license any exhibitor who did not employ members of Local 306; that it must not send any prints to those exhibitors, and that it was not to expect any member of Local 306 to work on any prints which would subsequently be exhibited by an exhibitor who did not employ Local 306 projection men exclusively. This demand had nothing whatever to do with the wages, conditions, terms and other lawful objectives of labor which were then under discussion between plaintiff and defendant Local 306, with respect to the members of said Local who were employed by plaintiff at its home office and its New York exchange.

“The Norris-LaGuardia Act was intended to protect the normal activities of labor in the formation of unions and in acting together to further their interests as members of a union, and from being re-

garded as constituting a conspiracy, even though their union activities might, to some extent, affect interstate commerce. *Allen Bradley Co. v. Local Union No. 3, et al.*, D. C. 41 Fed. Supp. 727, 750. The statute, however broad, does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. *Columbia River Packers Ass'n, Inc., v. Hinton*, 315 U. S. 143, 146, 147, 62 S. Ct. 520, 86 L. Ed.

“In the case at bar, the employer-employee relationship has no bearing. Local 306 is attempting to compel plaintiff to force the independent exhibitors whom plaintiff licenses to employ only members of Local 306 in its projection rooms. It is in the nature of a reverse secondary boycott, where the union, instead of attempting to coerce the retailer who carries non-union goods, here attempts to coerce the distributor of union goods to stop furnishing said materials to non-union customers. I do not believe that this is a labor dispute, nor do I believe that such action constitutes a lawful trade union objective.”

There is in the Amended Complaint herein concerned no element even remotely similar to that concerned in the *Basson* case on the basis of which the court there held that the Sherman Anti-Trust Act was applicable. As previously noted, the Amended Complaint herein is divided into two causes of action. Disregarding legal conclusions, the allegations in the first cause of action are solely to the effect that there existed at the time of the filing of the Amended Complaint a jurisdictional dispute between Local 946 of the United Brotherhood of Carpenters and Joiners of America and the defendant IATSE arising out of a series of contracts and awards involving the question as to which labor organization had jurisdiction

to construct the sets used on stages in the production of moving pictures. The second cause of action incorporates all of the allegations in the first cause of action and adds in addition sole new allegations to the effect that in its said jurisdictional dispute the defendant, Motion Picture Companies and Producers Association conspired with the defendant labor organizations "to deprive plaintiffs of the right and privilege to work at their chosen vocation, to-wit, studio carpenters."

On pages 60 to 62 of their opening brief, appellants insert quotations from *Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, 325 U. S. 797, 65 Sup. Ct. 1533, 89 L. Ed. 1939. The very first sentence that is quoted from the *Allen Bradley* case reveals without question that that case has no bearing whatsoever upon the issues here presented:

"The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufactures of goods to restrain competition in, and to monopolize the marketing of, such goods."

In the *Bradley* case, the factual situation upon which the court relied in holding that the Sherman Anti-Trust Act (26 Stat. 209, Chap. 647, 15 U. S. C. A., Sec. 1 *et seq.*; 4 F. C. A., Title 15, Sec. 1, *et seq.*) was there applicable was a combination between contractors, manufacturers, and defendant Local Union No. 3 in the City of New York that was designed for the specific purpose of excluding from the City of New York all electrical

equipment not manufactured in the City of New York in order that the contractors would be required to purchase all electrical equipment from manufacturers in the City of New York, as a result of which more jobs and better wages were obtained by defendant Local Union No. 3. Through a series of labor movements, the defendant Local had obtained close shop contracts with most of the contractors and manufacturers in the electrical supply industry, and thus the defendant Local was in a position to dominate completely, in the language of the court, "Not merely * * * terms and conditions of employment * * * but also price and market control." (*Allen Bradley, supra*, 325 Fed. 797, 799-800, 89 L. Ed. 1939-1943.) In the further language of the court:

"We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. It has been argued that this immunity can be inferred from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in

New York City, to bar all other business men from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. *Apex Hosiery Co. v. Leader*, *supra* (310 U. S. 503, 84 L. Ed. 1329, 60 S. Ct. 982, 128 A. L. R. 1044). But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Act.”

No further comment is needed to point out that the factual situation in the *Allen Bradley* case was completely foreign to that presented by the allegations herein concerned. On the contrary it was settled in *U. S. v. Hutcheson*, 312 U. S. 219, 85 L. Ed. 788, that the acts of the members of a labor union whether or not operating in restraint of interstate commerce, are taken out of the provisions of the Federal Anti-Trust Act by the provisions of Sec. 20 of the Clayton Act (38 Stat. at L. 730, Chap. 323; 29 U. S. C. A., Sec. 52). Since that decision concerned a jurisdictional dispute involving a strike because of an employer's refusal to accede to the union's demand that certain work be given to its members rather than to members of another craft union, the facts of the *Hutcheson* case are strikingly similar to those presented by the

Amended Complaint herein. (See *U. S. v. Hutcheson*, *supra*, 312 U. S. 219, 227, 85 L. Ed. 788-791.)

After setting forth the provisions of the Clayton Act of 1914 (38 Stat. at L. 730, Chap. 323, 15 U. S. C. A., Sec. 12), and of the Norris-La Guardia Act, *supra* (47 Stat. at L. 70, 29 U. S. C. A., Sec. 101-115) and discussing their history, the court pointed specifically to Section 20 of the Clayton Act (29 U. S. C. A., Sec. 52) and commented as follows:

“There is nothing remotely within the terms of Sec. 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying the Congress has made Sec. 20 inapplicable to trade union conduct resulting from them.

“In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which

Congress has not put into the federal legislation and which therefore we cannot write into it." (*U. S. v. Hutcheson, supra*, 312 U. S. 319, 322-323, 85 Law-
yer's Ed. 788-793.)

In the present case, all charges made in the Amended Complaint against the defendant "IATSE" are charges of acts done in competition for jobs against the plaintiff carpenters and under the express holding in the *Hutcheson* case the provisions of the Sherman Anti-Trust Act are in-applicable.

Moreover, in the absence of diversity of citizenship or other basis for federal jurisdiction, actions under the Sherman Anti-trust Law are limited to those brought by a person "injured in his business or property." Thus, section 15, of Title 15, U. S. C. A. provides that

"Any person who shall be injured in his buisness or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

It is clear, that under the decisions interpreting the phrase "injured in his business or property," the complaint reveals that none of the plaintiffs fall within the meaning of that phrase.

It has been uniformly held that a person who is an employee that loses his employment by reason of a combination forbidden in the anti-trust laws, or is an officer of a corporation and loses such office and the salary appurtenant thereto, or is a creditor of an individual or a corporation

put out of business, or is a stockholder whose stock becomes worthless, all by reason of combinations forbidden by such law, does not come within the meaning of the clause "injured in his business or property." In the complaint herein it is not even alleged or claimed that the employment of the plaintiffs or of any of them was for a stated period or that any of them had contracts that required the employers to continue their employment. Independently, however, of that basic defect, in the complaint, it is clear that none of the plaintiffs has been "injured in his business or property."

One of the most frequently cited decisions on this question is *Gerli v. Silk Ass'n of America, et al.*, 36 F. (2d) 959, in which the Court opens its opinion by stating: "Right to recover in this suit must be predicated on injuries to the plaintiff's 'business or property.'" It appears further from the Court's opinion

"that in all of the actions and proceedings hereinabove referred to, the plaintiff, Paul Gerli, acted on behalf of said Gerseta Corporation, and by the bill of particulars, wherein it is stated that the plaintiff was engaged in dealing in silks and silk products as an officer, stockholder, and managing agent of the Gerseta Corporation, and as employee of said corporation engaged as such in the trade and commerce of the corporation."

A combination in restraint of trade against the Gerseta Corporation was alleged, and it was further set forth

"that plaintiff's participation in foreign trade and commerce had been in his individual capacity, and further that when engaged in his individual capacity, he traded under his own name in the City of New York.
* * * Accordingly they must be interpreted as meaning that in certain transactions conducted by the

plaintiff *in behalf of* (emphasis by Court) the Gerseta Corporation he did business in his own name.”

Further, in setting forth the factual situation, the Court said:

“Aside from injuries to the business of the Gerseta Corporation and to the business of a company in which his family was interested, plaintiff’s only claims of damage are losses incurred by reason of the inability of the Gerseta Corporation to pay indebtedness owing to him, impairment of the value of his stock in the Gerseta Corporation, losses of future salaries and commissions to be received by him from the Gerseta Corporation, injury to his general credit and reputation, and damage to his business name and reputation.”

In disposing of the action adversely to the plaintiffs, the Court, on pages 960 and 961, said:

“In terms, the statute (15 U. S. C. A., Sec. 15), gives a right of action to one who has been ‘injured in his business or property.’ *Keogh v. Chicago & N. W. R. Co.*, 260 U. S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 163. In order to state a cause of action, plaintiff must therefore show by appropriate allegation that he has been injured in his business or property. It is not enough to allege something forbidden by the Anti-Trust Laws (15 U. S. C. A., Secs. 1-7, 15) and to claim general damage resulting therefrom. (*American Sea Green Slate Co. v. O’Halloran* (C. C. A.) 220 P. 77, 79), but the complaint asserting a statutory cause of action must affirmatively show the nature and character of the injury suffered, and that it was an injury to the plaintiff’s business or property within the meaning of the statute. *Noyes v. Parsons* (C. C. A.)

245 P. 689; *Jack v. Armour & Co.* (C. C. A.) 291 P. 741; *Alexander Milburn Co. v. Union Carbide & Carbon Corp.* (C. C. A. 4), 15 P. (2d) 678. . . . *Nor is the loss of a corporate office and the salary incident thereto injury to business or property within the meaning of the statute.* *Corey v. Boston Ice Co.* (D. C.) 207 P. 465. Injuries to plaintiff's general credit and reputation are not injuries to his business (for he had none independently of the corporate business) or to his property. Reference is made to *United Copper Securities Co. v. Amalgamated Copper Co.* (C. C. A.) 232 P. 574, but there the right to recover treble damages was predicated upon injury to the business of organizing, promoting, and financing companies in which plaintiff's assigners were engaged as individuals. The plaintiff could not be injured in his business, because he had none of his own or any plans to engage in any business other than the business of the corporation for which he worked. Such decisions as *Thomsen v. Union Castle Mail S. S. Co.* (C. C. A.) 166 P. 251; *Penn. Sugar R. Co. v. American Sugar R. Co.* (C. C. A.) 166 P. 254, and *Meeker v. Lehigh Valley R. Co.* (C. C. A.) 183 P. 548, are therefore not in point."

We direct the Court's attention to the case of *Westmoreland Asbestos Co. v. Johns-Manville Corp., et al.*, 30 Fed. Supp. 389, adhered to on re-argument in 32 Fed. Supp. 731, and affirmed by the Circuit Court of Appeals for the Second Circuit "on opinion below" in 113 F. (2d) 114, in which the court observed that "*neither loss of corporate office and salary incident thereto, nor injuries to a corporate officers general creditor are injuries to his business or property within the meaning and intent of the Anti-Trust laws.*"

Another decision on this subject frequently noted is *Corey v. Boston Ice Co.*, 207 Fed. 465, in which the plaintiffs alleged that as a result of an unlawful combination in violation of the anti-trust act the defendants acquired control of a corporation of which plaintiffs were salaried officers, and following such control plaintiffs were removed from office and deprived of their salaries. The Court in denying relief, on page 466, stated as follows:

“However long they held their respective offices, or however frequently they may have been re-elected, there is nothing to show that they had any right to expect that they would be chosen again at this or any given election, nor to show any right of property in the offices mentioned or the salaries attaching thereto, or any such interest in them after the dates of the meetings in 1908 as entitled them to say that failure to elect them to those offices was an injury to their business within the meaning of section 7, whether or not the election of other persons in their places can be said to have been acts unlawful because done, as the plaintiffs say, in pursuance and furtherance of a combination, conspiracy, or in an attempt to monopolize, obnoxious to the act. *That they lost the salaries they have been receiving and have not been able to get other employment or other remunerative employment since cannot therefore give them any rights against the defendant under section 7.*”

Accord:

Loeb v. Eastman Kodak Co., 183 Fed. 704.

The rule is stated in 41 Corpus Juris, page 186, as follows:

“If the injury sustained is indirect, remote, and consequential, there can be no recovery.”

The most recent decision on the subject is *Roseland v. Phister Mfg. Co., et al.*, a decision of the Circuit Court of Appeals for the Seventh Circuit reported in 125 F. (2d) 417, from which at page 419, we take the following observation:

“Ordinarily persons who may claim injury to their business under the Act do not include a stockholder making claim for injury or damage to the business of his corporation, *Corey v. Independent Ice Co.*, D. C. 207 F. 459; *Gerli v. Silk Ass’n of America, et al.*, 36 F. 2d 959, a creditor suing to recover damages to his debtor’s business, *Noyes v. Parsons, et al.*, 9 Cir., 245 F. 689, or an officer or director suing to recover for injury to the business of the corporation.”

A discussion of this question may be found in 139 A. L. R. at page 1017.

Accordingly, even if it be assumed that the complaint herein alleged, which it does not, that the defendants engaged in a combination “in restraint of commerce or trade” in the movie industry, if as a result of any such combination having such effect, plaintiffs lost their jobs, theirs was an incidental injury, if any, and certainly not one that resulted from any such hypothetical curtailment of commerce or trade in that industry.

VI.

The Taft-Hartley Bill, Effective Approximately Five Months After the Dismissal Below, Has No Bearing Whatsoever on This Action.

Authorities:

Vandenbark v. Owens-Illinois Glass Company, 110 F. (2d) 310 at 313-314;

Neild v. District of Columbia, 110 F. (2d) 246, 254;

Wright v. Southern Railroad Company, 80 Fed. 260;

Newgass v. Atlantic & D. Ry. Co., 56 Fed. 676;

Taft-Hartley Bill, Section 301(a);

H. R. 3020, Cal. No. 105, April 18, 1947;

Oscar Schatte, et al. v. International Alliance, etc., et al. (Dist. Ct. So. Dist., Central Div., Calif.), No. 7304-PH;

I. M. R. A., 1947, Section 301, Subsection (a).

Finally, appellants put forth the contention on pages 63 to 67 of their opening brief that jurisdiction in the Court below was vested by virtue of the provisions of the Taft-Hartley Bill. The original complaint herein, however, was filed on December 7, 1946. The amended complaint was not filed until January 3, 1947. The Taft-Hartley Bill, however, did not become effective until June 23, 1947, although judgment of dismissal below had been rendered on February 25, 1947. Accordingly, the Taft-Hartley Bill could not possibly constitute a ground for reversal unless it were given a retroactive effect. It is settled, however, that unless a newly enacted statute is specifically given retroactive effect by the Legislature its effect will solely be pros-

pective. In the language of *Vandenbark v. Owens-Illinois Glass Company*, 110 F. (2d) 310 at 313-314:

“ . . . a law is presumed, in the absence of clear expression to the contrary, to operate prospectively. *United States v. Heth*, 3 Cranch 399, 413, 2 L. Ed. 479; *Schwab v. Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 172, 48 S. Ct. 236, 72 L. Ed. 509, or its necessary converse, that for a statute to be construed as operating retrospectively, its retrospective character must be derived from ‘the unequivocal and inflexible import of the terms, and the manifest intention of the legislature’, *Union Pacific Ry. Co. v. Laramie Stockyards*, 231 U. S. 190, 34 S. Ct. 101, 102, 58 L. Ed. 179; or as said in *United States v. Heth*, *supra*, the declaration of retroactivity must be ‘clear, strong and imperative.’ ”

In the further language of *Neild v. District of Columbia*, 110 F. (2d) 246, 254:

“The rule is well settled that unless the contrary plainly appears a statute operates prospectively only (*Cox v. Hart*, 260 U. S. 427, 434, 43 S. Ct. 154, 67 L. Ed. 332; *Big Diamond Mills Co. v. United States*, 8 Cir., 51 F. 2d 721, 726). See generally, Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 778 *et seq.*); in other words, ‘that a statute ought not to be construed to operate retrospectively in the absence of clear, strong, and imperative language commanding it (*Home Indemnity Co. v. Missouri*, 8 Cir., 78 F. 2d 391, 394. See also, *United States v. Heth*, 3 Cranch, U. S., 399, 413, 2 L. Ed. 479; *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 34 S. Ct. 101, 58 L. Ed. 179; *Jones v. Fidelity & Columbia*

Trust Co., 6 Cir., 73 F. 2d 446); and if a double sense is possible that which rejects retroactive operation must be selected. (*Shwab v. Doyle*, 258 U. S. 529, 535, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454.)⁵

See, also:

Wright v. Southern Railroad Company, 80 Fed. 260;

Newgass v. Atlantic & D. Ry. Co., 56 Fed. 676.

There can be no question whatsoever that Section 303(a) of the Taft-Hartley Bill, relied upon at pages 65 to 67 of appellants' opening brief, creates new liabilities that did not previously exist, and that, accordingly, under uniform authority, that Section cannot be given retroactive effect.

On page 64 of appellants' opening brief, appellants cite Section 301(a) of the Taft-Hartley Bill which provides as follows:

“Sec. 301(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

The complaint herein, however, does not in any event fall within the scope of Section 301(a) for the reason that that Section authorizes only suits between an employer and a labor organization representing employees or between

any such labor organizations. There is nothing whatsoever in Section 301(a) that authorizes actions to be brought by individual employees as contrasted to labor organizations. Thus, it will be observed that the jurisdiction vested in District Court of the United States in that subsection is narrowly canalized; the subject matter of such actions is limited to "suits for violation of contracts," and those who may bring such actions or be made defendants therein must fall within confined categories, to-wit, employers or labor organizations representing employees in an industry affecting commerce. Assuming proper subject matter and proper parties, the District Courts of the United States have jurisdiction without respect to the amount in controversy or without regard to the citizenship of the parties. In the present suit, action was instituted solely by individual members of a labor organization and there is presented here neither a suit between an employer and a labor organization nor a suit between labor organizations.

On page 63 of their opening brief appellants quote discussions in the House debate on H. R. 3020, published in the Congressional Record April 17, 1947, page 3734, and rely upon a statement of Mr. Barden that "interested individual employees under the Declaratory Judgment Act" could bring proceedings under the provisions of Section 302 of the House Bill H. R. 3020. An analysis of the statements of Mr. Barden and Mr. Case of South Dakota, as quoted on page 64 of appellants' opening brief, however, when review in the light of the statement of Mr. Case of South Dakota, on page 64, that "It is involved

in the case of the Motion Picture Players of California . . .” would seem to indicate that the questions thus asked were perhaps not entirely posed without a very specific design in mind which design was entirely foreign to any true manifestation of congressional intent. It is to be noted that at the date of the making of the foregoing comment, this very action was pending.

Moreover, Section 302(a) of the House version of the Taft-Hartley Bill, which was the version under discussion in the foregoing hearing, was a very different draft from the provisions of Section 301(a) of the Taft-Hartley Bill that finally became law. Section 302(a) thus under discussion provided as follows:

“Sec. 302. (a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization *or other representative of employees* may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.”

(See H. R. 3020, Calendar No. 105, April 18, 1947.)

In addition to other important changes, there was deleted from the provisions of Section 302(a) of the House bill, the phrase, “or other representative of employees,” and such deletion clearly indicates the intent of Congress that law suits authorized under Section 301(a) of the Taft-Hartley Bill to be brought without regard to diversity of citizenship, were intended to be limited to suits between

an employer and a labor organization or between labor organizations. No clearer indication of intent than that indicated by the deletion of that phrase that suits by individual employees such as that here involved were not to be within the scope of the provisions of the final enactment could possibly be presented.

Moreover, the committee reports and congressional debates clearly indicate that Congress intended to limit jurisdiction under Section 301(a) to actions brought by labor organizations or employers. The following are examples of such reports and debates:

Report on Conference Bill by Managers on the Part of the House:

“The report stated that the Conference Agreement followed the House Bill in providing ‘that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought *by either party* in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction.’

Report of the Senate Committee on Labor and Public Welfare:

“Title III.

“SUITS BY AND AGAINST LABOR ORGANIZATIONS

“Section 301 is the only section contained in this title. [Others added on Senate floor and in confer-

ence.] It relates to *suits by and against labor organizations* for breach of collective bargaining agreements.’

Records of the Debate in the House of Representatives.

“On April 25, 1947, Mr. Murray, opposing the Bill, said:

“This section permits *suits by and against a labor organization* representing employees in such industries, in its common name, with money judgments enforceable only against the organization and its assets.’ (p. 4153.)

“On April 30, 1947, Mr. Smith said, supporting the Bill:

“I now come to Title III, which is very brief, and merely provides for *suits by and against labor organizations*, and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as the result of collective bargaining. That is all Title III does.” (p. 4410.)”

Moreover, that it was the intent of Congress to limit jurisdiction under Section 301(a) to actions brought by labor organizations or employers is indicated with clarity by the provisions of Section 301(b) of the Labor-Management Relations Act which provides as follows:

“(b) Any *labor organization* which represents employees in an industry affecting commerce as defined in this Act and *any employer* whose activities affect commerce as defined in this Act shall be bound by

the acts of its agents. Any *such labor organization* may sue or *be sued* as an entity and *in behalf of the employees whom it represents in the courts of the United States*. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”

Thus Section 301(b), immediately following Section 301 (a), provides that “Any *labor organization* which represents employees in an industry affecting commerce as defined in this Act . . . may . . . *be sued . . . in behalf of the employees whom it represents in the courts of the United States.*” Thus, section 301(b) provides for suits by dissident groups within a union against the union itself. There is no provision in Section 301(b) or anywhere else in the Labor-Management Relations Act, however, that provides that the “employees” of an outside and hostile labor organization may sue such labor organization. Clearly, in thus providing for suits by dissident groups within a union against a union itself and yet remaining totally silent with respect to the rights of groups within a union to sue an outside union, the congressional intent is indicated that such latter suits are not to be authorized by the provisions of the Act. It is respectfully submitted that no clearer example of the applicability of the well settled doctrine of *expressio unius est exclusio alterius* could be found than is thus presented.

On pages 66 and 67 of appellants' opening brief, quotations are taken from *Federal Deposit Insurance Corporation v. George-Howard*, 153 F. (2d) 591, at page 593. It is respectfully submitted that that decision has no bearing whatsoever upon the Labor Management Relations Act of 1947 or upon any of the other issues here presented.

It is further submitted that this court has the right to take judicial notice of actions pending in the various district courts of the United States comprising the 9th Circuit, that involve the identical litigation that is here presented, and we therefore ask this court to take judicial notice of the action of *Oscar Schatte, et al. v. International Alliance etc., et al.*, being No. 7304-PH in the office of the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, which said action was filed on July 2, 1947. In that action, certain of the plaintiffs in this action are plaintiffs there and the defendants herein are made defendants therein. The plaintiffs in that action have specifically pleaded and have specifically attempted to set forth causes of action under the Federal Anti-Trust Laws and under the Labor Management Relations Act based on the same factual situation here concerned. We respectfully submit further that no attempt was made in the amended complaint herein to state causes of action under either of the said statutory enactments and that no such causes of action were stated.

Conclusion.

The intentional or unintentional efforts of appellants to obscure the issue, made through the use to great excess in their complaint of legal conclusions and through the use of vague terms totally unassociated with any provisions of Federal statutory or constitutional law in their opening brief, do not eliminate the fact that the complaint indicates clearly that this litigation involves merely a jurisdictional dispute between two labor unions over the jurisdiction of the task of erecting sets in the Hollywood studios, which dispute centers around the interpretation of certain contracts and awards.

Since the complaint herein affirmatively reveals that no diversity of citizenship exists between the plaintiffs and the defendants or any of them, it is respectfully submitted that the decision of the lower court dismissing the complaint was unquestionably sound.

Respectfully submitted,

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APPENDIX A.

Excerpt from *United Electrical etc. Workers v. I. B. of E. Workers*, 115 F. (2d) 488:

“This is an appeal from a judgment dismissing a complaint for insufficiency on its face and must therefore be decided solely upon its allegations. The complaint alleged that the plaintiff was an unincorporated labor union whose members are engaged in producing electrical machinery and the like, and which had been chosen as collective bargaining representative ‘by numerous employees,’ and certified by the National Labor Relations Board ‘on numerous occasions’; so that now it is the representative ‘of the majority of employees in the said industry and certified as such in a vast majority of the cases wherein such disputes had arisen’. The defendant, International Brotherhood, is also an unincorporated labor union whose members are engaged ‘primarily * * * in the installation of electrical equipment’. Two other defendants are locals of the Brotherhood, and all the corporate defendants except the National Electric Products Corporation are ‘engaged in the handling and installing of electrical machinery’; the National Electric Products Corporation is a manufacturer of such machinery. *All the defendants have conspired ‘to deprive the plaintiff of the right conferred upon and guaranteed to it’ by the National Labor Relations Act, 29 U. S. C. A. Sec. 151 et seq., ‘as the representative of its members and other workers in the said industry for collective bargaining.’ To carry out this conspiracy the defendants agreed among themselves and with others; (a) ‘not to allow’ the plaintiff’s members and other workmen ‘to freely choose their own representatives for the purpose of bargaining collectively * * * but to coerce them*

to designate' the Brotherhood, or its creatures; (b) to prevent members of the Brotherhood from installing any electrical machinery made by workmen who had chosen the plaintiff as their bargaining representative; and (c) to notify all employers that unless they refused to bargain collectively with the plaintiff when it was chosen as bargaining representative, they would not install the products of these employers and would prevent their installation. That, further to carry out the conspiracy the defendants (d) boycotted all products made by these employers, among which were those made by the plaintiff's members employed in shops in which it had been chosen the bargaining representative; and (e) had notified 'all dealers and jobbers in electrical machinery' of the boycott, because of which many of those notified stopped handling such products."

* * * * *

"We hold that the plaintiff has no recourse to any court for the loss of its members; that may, or may not be so. But if it has, the suit does not 'arise under the * * * laws of the United States', the only basis of jurisdiction here put forward; its gravamen must be a violation of the law of a State. But Sec. 7 does not protect a union against that kind of wrong committed by a competing union except as an incident to the determination by the Board of its right to act as a bargaining representative."

APPENDIX B.

Excerpt from *General Committee etc. v. Mo.-K.-T. R. Co.*, 320 U. S. 323, 88 L. Ed. 76:

“It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. *It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts.* It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. In the *Brotherhood of R. & S.S. Clerks* case and in the *Virginian R. Co.* case, the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these *jurisdictional controversies.* It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforceable by judicial decree to only one of its phases. The contention, however, is that the rule which Congress intended to govern can be found from the implications of the Act. Thus it is argued that the reasons which support the holding in the *Virginian R. Co.* case that the right of majority craft representation is exclusive also suggest that Congress intended to write into the Railway Labor Act a restriction on the rules and working conditions concerning which the craft has the right to contract. It

is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian R. Co.* case (300 U. S., p. 548, 81 L. ed. 799, 57 S. Ct. 592) that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of Sec. 2, Ninth. But the decision does not imply, as is argued here, that every representation problem arising under the Act presents a justiciable controversy. *It does not suggest that the respective domains for two or more overlapping crafts should be litigated in the federal district courts.*

*It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of Sec. 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, *supra*, p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the*

range of jurisdictional disputes embraced within Sec. 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left the group of disputes to the National Mediation Board. If the present dispute falls within Sec. 2, Ninth, the administrative remedy is exclusive. If a narrower view of Sec. 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those *voluntary processes* whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. *There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized.* But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread.

We are here concerned solely with legal rights under this Federal Act which are enforceable by courts. For unless such a right is found it is apparent that that is not a suit or proceeding 'arising under any law regulating commerce' over which District Court had original jurisdiction by reason of Sec. 24(8) of the Judicial Code, 28 U. S. C. A., Sec. 41(8), 7 F. C. A., Title 28, Sec. 41(8). [Citing cases.] When a court has jurisdiction it has of course 'authority to decide the case either way.' The *Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 S. Ct. 410. But in this case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer."

APPENDIX C.

Excerpt from *American Federation of Labor v. J. Tom Watson*, 90 L. Ed., Advance Sheet No. 11, pp. 718-22:

“The initial question is whether the District Court had jurisdiction as a federal court to hear and decide merits. The federal district courts had jurisdiction of all suits of a civil nature, at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, \$3,000 and ‘arises under the Constitution or laws of the United States.’ Judicial Code, Sec. 24(1), 28 U. S. C. A., Sec. 41(1), 7 F. C. A., Title 28, Sec. 41(1).”

* * * * *

“The District Court held it had jurisdiction under Sec. 24(1) of the Judicial Code. *None of the parties challenges that finding here.* The District Court also held that it had jurisdiction under Sec. 24(14) of the Judicial Code, 28 U. S. C. A., Sec. 41(14), 7 F. C. A. Title 28, Sec. 41(14). That provision gives the district courts of the United States jurisdiction over suits brought under the Civil Rights Act without allegation of any jurisdictional amount. [Citing cases.] We do not pass on the question whether the District Court had jurisdiction under Sec. 24(1) or Sec. 24(14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in Sec. 24(8) of the Judicial Code, 28 U. S. C. A., Sec. 41(8), 7 F. C. A., title 28, Sec. 41(8) which grants the federal district courts jurisdiction of all ‘suits and proceedings arising under any law regulating commerce.’ As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under

that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop. Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court conclude that a suit to protect it against impairment by state action is a suit 'arising under' a federal law 'regulating commerce.'" [Citing cases.]

* * * * *

"But even though a district court has authority to hear and decide the case on the merits, it should not invoke its powers unless those who seek its aid have a cause of action in equity. [Citing cases.] The power of a court of equity to act is a discretionary one. *Pennsylvania v. Williams*, 294 U. S. 178, 185, 79 L. Ed. 841, 847, 55 S. Ct. 380, 96 A. L. R. 1166. Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.'" [Citing cases.]

* * * * *

"As we have said, the District Courts passed on the merits of the controversy. In doing so at this stage of the litigation, we think it did not follow the proper course. The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning."

No. 11653.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Appellees.

Brief of Appellees Association of Motion Picture Producers, Inc., Loew's Incorporated, Paramount Pictures Inc., Warner Bros. Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Technicolor Motion Picture Corporation, Twentieth Century Fox Film Corporation, R.K.O. Radio Pictures, Inc., and Universal Pictures Company, Inc.

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IN THE

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Appellees.

Brief of Appellees Association of Motion Picture Producers, Inc., Loew's Incorporated, Paramount Pictures Inc., Warner Bros. Pictures, Inc., Columbia Pictures Corporation, Samuel Goldwyn Productions, Inc., Republic Productions, Inc., Hal E. Roach Studio, Inc., Technicolor Motion Picture Corporation, Twentieth Century Fox Film Corporation, R.K.O. Radio Pictures, Inc., and Universal Pictures Company, Inc.

Statement of the Case.

By the allegations of their amended complaint, appellants seek a declaration of their rights under a purported collective bargaining agreement between the Carpenters'

Union and appellee Motion Picture Companies and under an arbitration award alleged to have been made pursuant to said agreement. Stripped of legal conclusions, evidentiary matter and other irrelevant matter, the dispute alleged to exist between appellants and appellees is simple. Appellants allege that between October 15 and 25, 1945, the Carpenters' Union, the IATSE, and the Motion Picture Companies agreed that studio work should be assigned to members of the Carpenters' Union and the IATSE in accordance with an arbitration award to be issued within 60 days thereafter; that on December 26, 1945, and within the 60-day period, the arbitrators awarded "erection of sets on stages" to the IATSE; that the Motion Picture Companies interpreted such award as meaning that sets on stages were to be constructed by members of the IATSE; that such interpretation was erroneous and was made because of pressure from and a conspiracy with the IATSE; that in August, 1946, long after the expiration of the 60-day period within which they were authorized to act, the arbitrators issued a "clarification" in which they interpreted "erection" as meaning "assemblage" instead of "construction"; that the interpretation placed by the Motion Picture Companies upon the words "erection of sets on stages" was violative of their agreement and deprived plaintiffs, as third party beneficiaries under such agreement, of civil rights guaranteed by the Constitution and statutes of the United States. Stated more briefly, the controversy set forth in the complaint is a controversy over the meaning of a purported agreement between the Carpenters Union, the IATSE and the Motion Picture Companies. The District Court so recognized the issue and appellants adopted the District Court's statement as their Statement of the Case. (App. Br. p. 6.)

I.

Jurisdiction of the District Court Cannot Be Predicated Upon the Claim That This Case Arises Under the National Labor Relations Act.

1. To be a Case Arising Under a Law of the United States, a Suit Must Involve a Real and Substantial Dispute Respecting the Validity, Construction, or Effect of Such Law of the United States, Upon the Determination of Which the Result Depends.

Shulthis v. McDougal, 225 U. S. 561, 569:

“A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.”

Gully v. First National Bank, 299 U. S. 109, 112:

“How and when a case arises ‘under the Constitution or laws of the United States’ has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. (Citing cases.) *The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.*”

2. The Complaint Does Not Set Forth Any Facts Even Purportng to Show a Violation of Any of the Provisions of the National Labor Relations Act.

(a) THE NATIONAL LABOR RELATIONS ACT DOES NOT REQUIRE THAT EMPLOYERS OR UNIONS ENTER INTO COLLECTIVE BARGAINING CONTRACTS, MUCH LESS THAT THEY PERFORM THEM WHEN MADE.

Appellants cite only Section 7 of the Act:

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

The mandate of this Section implemented by Section 8(5) of the Act (which makes it an unfair labor practice for an employer to refuse to bargain collectively) is that employers are required to *negotiate* in good faith with respect to wages, hours and working conditions; they are not required to reach an agreement.

Report No. 573, Senate Committee on Education and Labor, 74th Congress, 1st Sess., page 12:

“The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.”

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 45:

“The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer ‘from refusing to make a collective contract and hiring individuals on whatever terms’ the employer ‘may by unilateral action determine.’ ”

Lund v. Woodenware Workers Union (D. C., Minn.), 19 Fed. Supp. 607, 609:

“In fact, it seems reasonably clear that Section 159 (a), 29 U.S.C.A., does not necessarily contemplate the making of a contract between the employer and employees, nor does it seek to compel an employer to make any contract with the designated representatives of the majority.”

Contrary to any claim that the appellee companies have refused to negotiate with appellants’ representatives, appellants claim that they have so negotiated and that a contract has resulted. Appellants in their own words seek no more and no less than a construction of this contract.

“This suit for declaratory relief is based upon said actual controversy, that involves the interpretation of the terms and provisions of said contracts and arbitration awards, and clarification thereof, and the determination of the rights and obligations of each and all of the respective parties hereto thereunder.” (App. Br. p. 30.)

Plaintiffs quote, apparently with approval, the District Court’s statement of the issues:

“* * * we have an action in which private individuals ask this court to construe their rights under a con-

tract negotiated on their behalf by a labor union, and to protect such rights from interference with or invasion by other persons acting individually or in conspiracy with each other.” (App. Br. p. 25.)

- (b) IF A VIOLATION OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT IS SET FORTH IN THE COMPLAINT, A CHARGE OF UNFAIR LABOR PRACTICE IS MADE AND EXCLUSIVE JURISDICTION THEREOF RESTS WITH THE N.L.R.B.

This exclusive jurisdiction is provided for in no uncertain terms by Section 10(a) of the N.L.R.A.:

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.”

It has been held in numerous cases that the District Courts, even in diversity cases, have no jurisdiction to hear such a cause. *Myers v. Bethlehem Corp.* (1938), 303 U. S. 41, 48:

“The District Court is without jurisdiction to enjoin hearings because the power ‘to prevent any person from engaging in any unfair practice affecting commerce,’ has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: ‘This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.’ ”

Lund v. Woodenware Workers, supra, 19 Fed. Supp. 610:

“* * * but in any event, it seems reasonably clear that the National Labor Relations Board is vested with exclusive jurisdiction in all matters arising under this act, except as may be specifically granted to the courts, with reference to the enforcement of cease and desist orders, subpoenas, and the consideration of appeals.”

3. The Fact That the Contract Which Appellants Seek to Have Construed Was Executed as a Result of Negotiations Required by the National Labor Relations Act Is Not Sufficient to Make This a Case Involving the Validity, Construction, or Effect of That Act, and, Consequently, Does Not Make It a Case Arising Thereunder.

(a) THE FEDERAL COURTS HAVE SO HELD WHERE THE PARTIES HAVE ATTEMPTED TO FOUND JURISDICTION ON THE FACT THAT A COLLECTIVE BARGAINING CONTRACT MADE PURSUANT TO NEGOTIATIONS REQUIRED BY THE N.L.R.A. WAS INVOLVED.

In *Lund v. Woodenware Workers, supra*, an employer sought to enjoin minority employees from interfering with a contract made with the representative of the majority. The defendants moved to quash plaintiffs' application for a temporary injunction on two grounds; the first that the Court lacked jurisdiction because there was no Federal question involved and the second that the Norris-LaGuardia Act had not been complied with. The Court

found it unnecessary to discuss the second ground inasmuch as it found no Federal question to be involved. (Page 609):

“A reading of the Wagner Act impels the view that it was passed primarily to eliminate unfair labor practices on the part of the employer, to guarantee to the employees the right of self-organization, and to secure the right to bargain collectively through representatives of their own choosing. There is no express provision in the act which seeks to affect, limit, or curb unfair practices on the part of labor towards the employer. Unquestionably, the contract that plaintiff contends he has entered into with the representatives of the majority of his employees may be entirely valid, *but the mere fact that the employer has made a valid contract with his employees does not, of itself, give rise to any justiciable controversy in federal court under the act.* There is no intimation in the act that, merely because an employer has entered into a contract with a majority union, Congress assumed to vest jurisdiction in United States courts to protect or safeguard the integrity of such contract.”

In *Blankenship v. Kurfman* (C. C. A. 7, 1938), 96 F. (2d) 450, members of a union having a contract made pursuant to the requirements of the N.L.R.A. commenced action against another union to enjoin interference with the performance of said contract by plaintiffs and the other members of their union. Plaintiffs contended that defendant's action deprived plaintiffs of rights and privileges secured by the N.L.R.A. The Court said:

“And we find no provision in the act which can be construed as intending to create rights for em-

employees which can be enforced in federal courts independently of action by the National Labor Relations Board. Consequently, we hold that the contract in the instant case between the plaintiffs and their employer did not, by force of the National Labor Relations Act, create a right in the plaintiffs which was secured to them 'by the Constitution or laws of the United States.' Consequently, the alleged unlawful interference by the defendants with the plaintiffs' contractual rights did not give a cause of action of which a federal court would have jurisdiction in the absence of diversity of citizenship."

The same question was involved in *Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 207, v. Spreckles* (C. C. A. 9, 1941), 119 F. (2d) 64, where the union having a contract made pursuant to negotiations required by the N.L.R.A., sought to enjoin interference by a regional director of the National Labor Relations Board who was alleged to be acting outside of his authority. The District Court declined jurisdiction and was affirmed. (Page 65):

"Amalgamated admits that no provision of the National Labor Relations Act, 29 U. S. C. A. §151 *et seq.*, is violated and it does not claim that Spreckels' acts violated any other United States statute or the Federal Constitution. Since no diversity of citizenship is shown nor the amount of damages threatened, we can find no ground for jurisdiction in the district court. Amalgamated's forum, if any, is in one of the state courts."

(b) THE FACT THAT A COLLECTIVE BARGAINING AGREEMENT WAS MADE PURSUANT TO NEGOTIATIONS REQUIRED BY THE RAILWAY LABOR ACT, WHICH USES LANGUAGE SUBSTANTIALLY SIMILAR TO SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT, HAS BEEN HELD NOT TO RESULT IN THERE BEING A FEDERAL QUESTION IN A SUIT TO CONSTRUE OR ENFORCE SUCH A CONTRACT.

In *Malone v. Gardner* (C. C. A. 4), 62 F. (2d) 15, plaintiffs sued to enjoin union officers from interfering with a contract made by plaintiffs' union with a railroad company as a result of negotiations under the Railway Labor Act. Defendants moved to dismiss upon the ground that the Court was without jurisdiction. The Circuit Court of Appeals affirmed the District Court's order granting the motion to dismiss:

“When these established rules are applied to the case stated in the bill, it will be seen that the construction or applicability of the Railway Labor Act is not really involved in this case. The suit relates to an agreement of employment whereby the plaintiff acquired certain contract rights of value; but neither the agreement nor the rights secured thereby were founded upon the Labor Act, nor is their construction or effect in any way affected thereby.”

* * * * *

“The decision of this case, however, is based on the settled rule that the federal courts have not been given jurisdiction to try all actions arising out of agreements between carriers and their employees, or to require them to respect and maintain their agreements.”

Delaware, L. & W. R. Co. v. Slocum (D. C., N. Y.), 56 Fed. Supp. 634, was an attempt on the part of an employer to have a judicial determination of a jurisdictional question arising out of its having made collective bargaining agreements, pursuant to negotiations required by the Railway Labor Act, with two unions, each of which claimed their agreements covered the same work. After removal from a state court, defendant sought to dismiss and plaintiff to remand. The District Court remanded the case. (Page 636):

“A suit does not arise under the laws of the United States unless it ‘really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends.’ (Citing cases.) It is patent from the complaint that this suit does not involve the ‘validity, construction, or effect’ of any federal statute, but rather seeks the determination of its rights or liabilities under certain contracts.”

- (c) AN ACTION BROUGHT TO ENFORCE A RIGHT UNDER A CONTRACT WHICH IS MADE AS THE RESULT OF RIGHTS GRANTED UNDER THE PATENT LAWS TO RESERVE ROYALTIES UPON SALE OR LICENSE OF PATENTED ARTICLES IS NOT AN ACTION ARISING UNDER THE LAWS OF THE UNITED STATES.

Wade v. Lawder, 165 U. S. 624;

Henry v. A. B. Dick Co., 224 U. S. 1, 14;

Odell v. F. C. Farnsworth Co., 250 U. S. 501, 504.

(d) AN ACTION TO ENFORCE A RIGHT UNDER A CONTRACT WHICH IS MADE AS THE RESULT OF RIGHTS GRANTED UNDER THE COPYRIGHT LAWS TO RESERVE ROYALTIES UPON THE SALE OR LICENSE OF COPYRIGHTED MATERIAL IS NOT AN ACTION ARISING UNDER THE LAWS OF THE UNITED STATES.

Silver v. Holt (C. C.), 84 Fed. 809;

Danks v. Gordon (C. C. A. 2), 272 Fed. 821, 827.

(e) THE CASES CITED BY APPELLANTS DO NOT SUPPORT A CONTRARY RULE.

Steele v. Louisville and Nashville R. R. Co., 323 U. S. 192, merely held that under the Railway Labor Act the statutory representative of a craft had a duty to represent those within the class without discrimination. This duty was found in the language and purpose of the Act which gives such representatives exclusive powers and guarantees to all railway employees the right to "bargain collectively through representatives of their own choosing."

The Federal right upon which jurisdiction was based was derived directly from the Act, which as we have seen, in common with the National Labor Relations Act, guarantees the right of representation, but does not require the making of contracts nor provide for the enforcement or construction of those which are made.

A. F. of L. v. Tom Watson (1946), 327 U. S. 582, held only that the right to bargain collectively granted by Section 7 of the National Labor Relations Act might include the right to bargain for a closed shop and, consequently, that a right derived from a Federal law could be

threatened by a state constitutional amendment outlawing the closed shop. (Page 591):

“We do not pass on the question whether the District Court had jurisdiction under §24(1) or §24(14) of the Judicial Code. For it is the view of a majority of the Court that jurisdiction is found in §24(8) of the Judicial Code, 28 U. S. C. §41(8), which grants the federal district courts jurisdiction of all ‘suits and proceedings arising under any law regulating commerce.’ As we have said, the bill alleges a conflict between the Florida law and the National Labor Relations Act. The theory of the bill is that labor unions, certified as collective bargaining representatives of employees under that Act, are granted as a matter of federal law the right to use the closed-shop agreement or, alternatively, *that the right of collective bargaining granted by that Act includes the right to bargain collectively for a closed shop.* Whether that claim is correct is a question which goes to the merits. It is, however, a substantial one. And since the right asserted is derived from or recognized by a federal law regulating commerce, a majority of the Court, conclude that a suit to protect it against impairment by state action is a suit ‘arising under’ a federal law ‘regulating commerce.’ ”

The Court did not even remotely suggest that the National Labor Relations Act went any farther than to guarantee the right to *bargain for* a closed shop and the case is no authority whatsoever for the proposition that collective bargaining agreements made pursuant to this bargaining requirement are subject to enforcement or construction as Federal questions.

4. The Fact That the Enactment of Sections 301(a) of the Labor-Management Relations Act of 1947, Amending the National Labor Relations Act Expressly to Provide for District Court Jurisdiction in Certain Cases Arising Under Collective Bargaining Contracts Made Pursuant to Negotiations Required by the National Labor Relations Act, Was Deemed Necessary by Congress Is Persuasive That Prior Thereto the National Labor Relations Act Did Not so Provide and Such Cases Could Not be Maintained in the District Court in the Absence of Diversity of Citizenship.

(a) LEGISLATIVE INTERPRETATION MANIFESTED IN LATER LEGISLATION IS ENTITLED TO WEIGHT IN DETERMINING THE MEANING OF PRIOR ENACTMENTS. WHERE AN AMENDMENT WOULD BE UNNECESSARY IF THE LAW HAD THE SAME MEANING BEFORE AMENDMENT THE ACT OF THE LEGISLATURE IN ENACTING THE AMENDMENT IS AN INTERPRETATION OF THE STATUTE AS NOT PREVIOUSLY PROVIDING WHAT IS PROVIDED FOR BY THE AMENDMENT.

The United States Supreme Court clearly recognized this principle in *Neuberger v. Commission* (1940), 311 U. S. 83, where an interpretation of the Revenue Act of 1932 as allowing deduction of individual losses from similar partnership gains was supported by the legislative history of subsequent Revenue Acts. The basic question involved was whether, under the 1932 Act, partnership gains and losses retained their identity as such in the income of the individual partners. The Court held that they did and in support of this holding pointed out that in 1933 Congress amended the Revenue Act so as to deny the retention of such identity and in so doing recognized that it was changing the law. The situation covered by the 1933 amendment was the converse of that involved in

the case, that is, the identity of partnership losses (not gains) was involved; nevertheless, the amendment and attendant legislative history were taken as applicable to the entire question of both gains and losses. The Court said:

“Our conclusion that this is the proper construction of §23(r)(1) is confirmed by the action of Congress since 1932. In 1933 Congress amended §182(a) of the Revenue Act of 1932 to deny to individual partners deductions for partnership losses which had been disallowed in the partnership return, the converse of the instant case. 48 Stat. 195, 209.” (p. 89.)

At this point the Court quoted the following from the legislative history of the 1933 Act.

“In Senate Finance Committee Report Number 114 (73rd Congress, 1st Sess.) accompanying the bill, it is stated at page 7:

“‘Subsection (d) amends the partnership provisions of existing law. Under existing law the individual members of a partnership are entitled to reduce their individual net incomes by their distributive shares of a net loss incurred by the partnership.’” (f. n. 3, p. 90.)

The Court, relying also on the subsequent act of Congress in passing the Revenue Act of 1938, summarized its entire argument based on legislative interpretation as follows:

“That the amendment of 1933 changed and the Revenue Act of 1938 restored the law of 1932 as we have explained it is plain from the legislative history of the two Acts and of §23(r)(1).” (p. 90.)

In *Newell v. Baltimore & O. R. Co.* (1910), 181 Fed. 698, the Court held that an action brought in the Federal Circuit Court in Pennsylvania by a Pennsylvania citizen against a Maryland corporation should be dismissed for lack of jurisdiction when it was revealed by amendment to the complaint that the case arose under the Federal Employers Liability Act. The Act had been amended subsequent to the filing of the complaint to give jurisdiction to the Circuit Court in the district of the residence of the plaintiff as well as that of the defendant, but at the time the suit was brought it was silent on the question of the proper court in which to sue. The Judiciary Act in effect provided that except where jurisdiction was based on diversity of citizenship alone no suit should be brought against any person "in any other district than that whereof he is an inhabitant." The fact that the Employer's Liability Act was amended expressly to provide for jurisdiction in the district of the plaintiff's residence in lieu of remaining silent on the subject was relied upon by the Court as establishing that the Act before amendment made no special jurisdictional grant and suits thereunder were required to be brought in compliance with the requirements of the Judiciary Act.

"The very fact that such enactment was deemed necessary by Congress is persuasive that prior thereto such action could only be brought in accordance with the acts conferring jurisdiction upon the Circuit Courts of the United States, to wit, . . ." (p. 701.)

Board of Com'rs of Sweetwater County, Wyo., v. Bernardin, C. C. A. 10 (1934), 74 F. (2d) 809, 813:

“If the gross product tax was a tax on the realty, then it was a lien upon such realty and this amendment was wholly unnecessary. It therefore amounts to a legislative construction of section 3, art. 15, and the gross product tax statute to the effect that the tax is upon the severed product. A construction of a statute by the Legislature, as indicated by a subsequent enactment, is entitled to consideration as an aid in interpreting such statute.” (p. 813.)

Mackay v. Commissioner of Internal Revenue, C. C. A. 2 (1938), 94 F. (2d) 558, 561:

“The enactment in 1924 of section 302(d), 26 U. S. C. A. §411 note, is an indication that Congress then recognized the limited scope of section 302(c), or, to say the least, doubted that subdivision (c) included cases of this kind” (p. 561).

United States v. Board of Com'rs., D. C. N. D., Okla. (1939), 29 F. Supp. 270, 274:

“If the Act means what defendants contend, then the Amendment of May 19, 1937, was unnecessary. It appears that the Amendment of May 19, 1937, was enacted as it was the desire of Congress to restrict and limit the Act of June 20, 1936, to homesteads of not exceeding one hundred sixty acres. This Court must assume that Congress intended what it plainly said, and that the Amendment was enacted for the definite purpose of changing the existing law” (p. 274).

(b) THE LEGISLATIVE HISTORY OF SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT ESTABLISHES BEYOND DOUBT THAT BY ITS ENACTMENT CONGRESS INTENDED TO CREATE JURISDICTION NOT THERETOFORE EXISTING.

The Senate Committee on Labor and Public Welfare, in outlining the purposes of its amendments to the Act, and to Section 301(a) in particular, said, in its Report No. 105 dated April 17, 1947:

“Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce *should be enforceable in the Federal Courts*. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal Courts in disputes affecting commerce.”

That Congress was amply aware that it was greatly increasing the jurisdiction of the Federal District Courts and intended so to do is evidenced by the fact that it was well apprised of that circumstance by Senator Murray who on April 25, 1947, opposing the Bill in the Senate said:

“Section 301 of title II of the bill gives the Federal district courts broad jurisdiction to entertain suits for breach of collective-bargaining contracts in industries affecting interstate commerce, regardless of the amount in controversy and of the citizenship of the parties. This section permits suits by and

against a labor organization representing employees in such industries, in its common name, with money judgments enforceable only against the organization and its assets.

“The Federal courts have always had jurisdiction to entertain suits for breach of collective-bargaining contracts, and have awarded money damages where the amount in controversy fulfills the present \$3,000 requirement and diversity of citizenship exists.

“Every district court would still be required to look to State substantive law to determine the question of violation. This section does not, therefore, create a new cause of action, but merely makes the existing remedy available to more persons by removing the requirements of amount in controversy and of diversity of citizenship where interstate commerce is affected.

BURDEN ON COURTS

“The abandonment of the present amount in controversy and diversity of citizenship requirements is an *unwise departure from existing law*, which would impose a needlessly increased burden upon the Federal courts, already weighted down with litigation. . . .” (Congressional Record p. 4153.)

III.

The Jurisdiction of the District Court in This Case Is Not Affected by the Enactment of the Labor-Management Relations Act of 1947.

1. The Labor-Management Relations Act, While Confering Jurisdiction Upon the District Courts in Actions by Labor Organizations or Employers for Violation of Contracts Between Them Does Not Confer Jurisdiction Upon This Court Over Actions by Employees Asserting Rights Under Such Contracts.

(a) SECTION 301(a) OF THE LABOR-MANAGEMENT RELATIONS ACT.

“Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

(b) THE LEGISLATIVE HISTORY OF THIS SECTION INDICATES THAT IT WAS INTENDED TO APPLY SOLELY TO ACTIONS BROUGHT BY LABOR ORGANIZATIONS OR EMPLOYERS.

(i) *The Deletion of Language Carrying a Wider Import From the House Version of the Bill Indicates a Congressional Intent Not to Give Jurisdiction Beyond That Which the Language Finally Used Imports: i. e., Jurisdiction of Suits Between an Employer and a Labor Organization or Between Labor organizations.*

The text of Section 302(a) of the House version reads as follows:

“Section 302(a). An action for or proceeding involving a violation of an agreement between an employer and a labor organization, or other representative of employees, may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce or the court otherwise has jurisdiction of the cause.”

The omission of the words “or other representative of employees” in the Act as finally passed can hardly be construed as other than a deliberate withholding of jurisdiction in cases brought by representatives of employees other than labor organizations.

(ii) *The Committee and Conference Reports Clearly Indicate That Congress Meant to Limit Jurisdiction Under This Section to Actions Brought by Labor Organizations or Employers.*

After considering the advisability of recommending the adoption of the Senate bill, the Senate Committee on Labor and Public Welfare in its Report No. 105, dated April 17, 1947, made the following statement with reference to Section 301(a):

“Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal Courts. Our amendment would provide for suits *by unions* as legal entities and *against unions* as legal entities in the Federal Courts in disputes affecting commerce.”

The Senate Conferees explained the final form of Section 301(a) to the Senate on June 5, 1947 in the following manner (Congressional Record p. 6602):

“Section 301 differs from the Senate bill in two respects. Subsection (a) provides that violation of contracts *between labor organizations* as well as *between a labor organization and an employer* may be brought in the Federal Courts.”

The House Conferees, in reporting the bill back to the House on June 3, 1947, made a similar statement (page 6470):

“Section 302 of the House bill and Section 301 of the Senate amendment contained provisions relating to *suits by and against labor organizations* in the courts of the United States. The conference agreement follows in general the provisions of the House bill with changes therein hereafter quoted.”

(iii) *The House Debate Quoted by Appellants on Page 63 of Their Opening Brief Is Not Properly a Part of the Legislative History of Section 301(a), and Even if It Were, Is Not Controlling as to Its Meaning.*

The section under discussion by Mr. Barden and Mr. Chase was Section 302(a) of the House Bill. As already pointed out, the wording then used was much broader than that finally adopted and no discussion of its meaning could possibly be pertinent to the meaning of Section 301(a).

In the face of the considered reports above quoted taking the opposite view, the discussion between Messrs. Barden, Chase and Hartley is entitled to no consideration. It is a well settled rule of statutory construction that

while the debates in Congress are of little, if any, value in determining the meaning of a statute except possibly to show the general purpose of the act, reports of committees and of conferences are entitled to considerable weight. *Duplex Company v. Deering* (1920), 254 U. S. 443, 474:

“By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge v. Williams*, 3 How. 9, 24; *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 79; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns v. United States*, 194 U. S. 486, 495.”

Imhoff-Berk Silk Dyeing Co. v. U. S. (1930), 43 F. (2d) 836, 837:

“While legislative debate, partaking of necessity very largely of impromptu statements and opinions, cannot be resorted to with any confidence as showing the true intent of Congress in the enactment of statutes, a somewhat different standard obtains with reference to the pronouncements of committees having in charge the preparation of such proposed laws. These committee announcements do not of course carry the weight of a judicial opinion, but are rightly regarded as possessing very considerable value of an explanatory nature regarding legislative intent where the meaning of a statute is obscure.”

U. S. v. Trans-Missouri Freight Association (1896),
166 U. S. 290, 318:

“There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen v. Hertford College*, 3 Q. B. D. 693, 707.

“The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.”

Hills v. U. S. (Ct. Cl. 1932), 55 F. (2d) 1001, 1005:

“Extemporaneous answers to questions propounded in rapid-fire debate in Congress are of little weight, if any, in determining the construction of statutes, but, even if they should be so treated, the quotations which are made from the debates in Congress do not in any way help the defendant’s case.”

It is apparent even from a casual reading of the discussion quoted by appellants that the real question asked and answered was as to the propriety of granting declaratory relief in the exercise of the jurisdiction created, and that the words "or interested individual employees" were not necessarily considered by Mr. Hartley in his extemporaneous reply. Section 302(a) then provided for jurisdiction in "actions for or proceedings involving a violation of an agreement," language much more reasonably construed as authorizing declaratory relief than the "suits for violation of contracts" which appeared in the bill as finally passed.

Nor are the remarks quoted by the appellants, the only Congressional debates which bear upon this question. On April 25, 1947, Mr. Murray opposing the bill in the House of Representatives said (Congressional Record p. 4153):

"This Section permits *suits by and against a labor organization* representing employees in such industries, in its common name, with money judgments enforceable only against the organization and its assets."

Mr. Smith supporting the bill made the following statement in the House on April 30, 1947 (Congressional Record p. 4410):

"I come now to Title III, which is very brief and merely provides for *suits by and against labor organizations*, and requires that labor organizations as well as employers shall be responsible for carrying out contracts legally entered into as a result of collective bargaining. *That is all Title III does.*"

2. Even if the Labor-Management Relations Act Should be Held to Confer Jurisdiction Over Suits by Employees Asserting Rights Under Collective Bargaining Contracts, It Does Not Retroactively Confer Jurisdiction Over Pending Suits.

(a) THE LABOR-MANAGEMENT RELATIONS ACT DOES NOT PURPORT TO AFFECT PENDING CASES AND CANNOT PROPERLY BE CONSTRUED AS GIVING JURISDICTION IN PENDING CASES OVER WHICH THE COURT DID NOT HAVE JURISDICTION WHEN THEY WERE COMMENCED.

This action was commenced on December 7, 1946. The Labor-Management Relations Act of 1947 was enacted on June 23, 1947. Section 301(a) relates only to suits which "may be brought" and is therefore expressly applicable only to suits filed after June 23, 1947. A statute of a similar nature, employing this identical language, was held not to affect pending litigation. In *Newell v. Baltimore & Ohio R. Co.*, 181 Fed. 698, plaintiff had filed suit on March 5, 1910, in the Circuit Court in Pennsylvania, where he resided, against his employer, a railway corporation residing in Maryland. The cause of action was for injury arising out of plaintiff's employment in interstate commerce, and consequently there were two bases of federal court jurisdiction; diversity of citizenship, and federal question. The rule in such cases at the time the suit was brought was that the court having jurisdiction was the Circuit Court in the district in which the defendant was a resident. Thus, at the time of the commencement of the action, only the Maryland Circuit Court had jurisdiction.

On April 5, 1910 the Federal Employers' Liability Act was amended to provide that suits of the character here

involved "*may be brought*" in any of three districts. If applicable to pending suits the amendment clearly authorized plaintiff to sue in Pennsylvania. The court dismissed for lack of jurisdiction, and on motion by plaintiff to rescind this order, said (pp. 700-701):

"The plaintiff insists that jurisdiction should be sustained by reason of the Act of Congress approved April 5, 1910 (Act April 5, 1910, c. 143, 36 Stat. 291), passed to amend the employer's liability act, and particularly by the amendment to section 6, wherein it is provided among other things:

'Under this act an action *may be brought* in the Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.'

The very fact that such enactment was deemed necessary by Congress is persuasive that prior thereto such action could only be brought in accordance with the acts conferring jurisdiction upon the Circuit Courts of the United States, to wit, the act of March 3, 1887 (Act March 3, 1887, c. 373, 24 Stat. 552), as corrected by the act of August 13, 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. Stat. 1901, p. 508],) the material part of which is as follows:

'No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be

brought only in the district of the residence of either the plaintiff or the defendant.'

In addition, the amendment of 1910 does not confer jurisdiction upon pending suits. *The use of the words 'may be brought' clearly indicates that it refers to actions to be commenced after its passage.* In addition, also, it is a general proposition of law that statutes will not be given a retroactive effect or apply to pending cases unless they relate to procedure merely, or are so expressed in the act. As said by Mr. Justice Clifford in *Twenty Per Cent Cases*, 20 Wall. 187 (22 L. Ed. 339):

'Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.'

I am of the opinion that the amendment of 1910 was not retroactive, and did not confer jurisdiction upon this court over the defendant. Had plaintiff elected to proceed without amendment of his statement or declaration, the benefits which he hoped to have by reason of the employer's liability act, which are unnecessary to be stated, might have been lost to him."

In *Ft. Smith & W. R. Co. v. Blevins* (Okla. 1913), 130 Pac. 525, plaintiff had commenced an action on January 19, 1909 for injuries sustained by him in the sum of \$1,999.90 as the result of negligence of the defendant railroad company while plaintiff was in the employ of defendant. On April 5, 1910, the Federal Employer's Liability Act was amended to provide for concurrent

jurisdiction of state and federal courts in actions arising under the Act. On February 15, 1911, plaintiff amended his complaint to charge damages in the sum of \$12,250.00. Defendant thereupon filed a petition to remove the cause to the United States Circuit Court. The cause was properly removed unless the amendment to the Federal Employer's Liability Act deprived defendant of such right of removal. The pertinent portion of said amendment read as follows:

"Section 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"Under this Act an action *may be brought* in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act *shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.*" (Italics ours.)

The trial court refused to make an order of removal. Upon appeal, the Supreme Court reversed the trial court, holding that the 1910 amendment did not apply to cases brought before its effective date. The court cited and quoted at length from *Newell v. Baltimore and Ohio R. Co.*, and summarized its own holding in the syllabus by the court as follows:

"Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324) amending section 6 of the Employer's Liability Act (Act April 22,

1908, c. 149, 35 Stat. 66 [U. S. Comp. St. Supp. 1909, p. 1173]), so as to provide that the jurisdiction of the courts of the United States under said act shall be concurrent with that of the courts of the several states, and no case arising thereunder and brought in any state court of competent jurisdiction shall be removed to any court of the United States, has no application to actions brought prior to the amendment.”

Even without such affirmative language requiring a prospective operation only, Section 301(a), in the absence of language requiring a retrospective application, should be construed as applying only to suits filed subsequent to its effective date.

“Retrospective or retroactive legislation is not favored. Hence, it is a well settled and fundamental rule of statutory construction, variously stated, that all statutes are to be construed as having only a prospective operation, and not as operating retrospectively. It is equally well settled as a fundamental rule of statutory construction supported and established by numerous judicial decisions that statutes are not to be construed as having a retroactive effect.”

59 Corpus Juris 1159.

This principle is also stated and applied in the *Newell* and *Fort Smith* cases, *supra*.

(b) JURISDICTION IS DETERMINED ACCORDING TO THE LAW AND THE FACTS AS THEY EXIST AT THE TIME SUIT IS COMMENCED, AND IS NOT AFFECTED BY LATER DEVELOPMENTS.

“Jurisdiction is to be determined as of the time the suit was commenced.”

21 Corpus Juris Secundum p. 171.

Daidsburgh v. Knickerbocker Life Ins. Co. (1882), 90 N. Y. 526, 528, 530:

“It is conceded by the appellant’s counsel that this action was commenced on the 19th of February, 1872. The question upon this appeal, therefore, is to be determined by the law in force at that time, viz.: The act of 1870 (Chap. 470), entitled ‘An act to increase the number of judges of the City Court of Brooklyn, and to regulate the civil and criminal jurisdiction thereof,’ and not under the Code of Civil Procedure, for that statute was not then in force, nor are its provisions made applicable to actions theretofore pending” (p. 528).

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“The court below, therefore, committed no legal error in declining jurisdiction in this instance, and the judgment appealed from should be affirmed” (p. 530).

Pacific Telephone & Telegraph Co. v. Seattle (1926), 14 F. (2d) 877, at 879:

“The city contends that, all franchises having expired, the plaintiff is now a trespasser upon the

streets of the city, and that it has an adequate remedy at law, for damages accruing, and that the plaintiff, being a trespasser, may not invoke equity jurisdiction. This action was begun before Ordinance No. 6498 expired by limitation. Plaintiff, therefore, was not a trespasser at the inception of this suit (citing cases), and the jurisdiction is determined as of the time the suit was commenced.”

Fisher Flouring Mills v. Vierhus (1935), 78 F. (2d) 889, at 892:

“It would be a strange procedure for a court of chancery to measure the adequacy of a remedy at law, not by what the law is at the time the equity suit is filed, but by certain nebulous conjectures of what the law may be at some future time. ‘Jurisdiction is determined as of the time the suit was commenced.’”

Pugh v. Flannery (La. 1922), 92 So. 699, at 701:

“After the filing of an exception to the jurisdiction, nothing can be done to change or affect the issue pending its disposition by the court.”

Minneapolis Ry. v. Peoria Ry. (1926), 270 U. S. 580, at 586:

“The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought.”

IV.

Jurisdiction of the District Court Cannot Be Predicated on the Claim That This Case Arises Under the Fifth and Fourteenth Amendments.

In Paragraph VIII of plaintiffs' complaint, it is alleged that jurisdiction in this case depends upon the Fifth and Fourteenth Amendments to the United States Constitution. [Tr. of R. p. 7.] At page 48 of their brief, appellants contend that their rights under the purported collective bargaining agreement are guaranteed by the Fifth and Fourteenth Amendments.

The Fifth and Fourteenth Amendments do not furnish any basis of jurisdiction in this case. It is well settled that the Fourteenth Amendment prohibits state action, not individual action (*The Civil Rights Cases*, 109 U. S. 3; *Virginia v. Rives*, 100 U. S. 313, 318; *U. S. v. Harris*, 106 U. S. 629, 639); and that the Fifth Amendment prohibits Federal action, not individual action (*Corrigan v. Buckley*, 271 U. S. 323, 330). No allegation is made in the complaint that the Motion Picture Companies, in construing and carrying out their purported collective bargaining agreement with the Carpenters Union and the IATSE were acting as state or federal government representatives or were acting under color of any state or federal statute. The allegation is that defendant Motion Picture Companies have misconstrued the meaning of the purported collective bargaining agreement and have acted in accordance with such misconstruction. Such action is individual action and cannot possibly constitute a violation of either the Fifth or Fourteenth Amendments.

V.

Jurisdiction of the District Court Cannot Be Predicated Upon the Claim That This Case Arises Under the Civil Rights Statutes.

In Paragraph VIII of plaintiffs' complaint it is alleged that jurisdiction depends upon 8 U. S. C. A. 43, 28 U. S. C. A. 41 (14), and 28 U. S. C. A. 729. [Tr. of R. p. 7.] At page 53 and following of their brief, appellants argue that by employing IATSE members to erect sets on stages appellee Motion Picture Companies violated their purported collective bargaining agreement with the Carpenters Union and the IATSE and thus deprived members of the Carpenters Union of civil rights.

8 U. S. C. A. 43 and 28 U. S. C. A. 41(14) provide that where a defendant, under color of any law, statute, ordinance, regulation, custom or usage of any state deprives a plaintiff of certain rights, redress may be had therefor in the federal courts. 28 U. S. C. A. 729 establishes the procedure to be followed in the federal courts in actions brought under these statutes. The liability created by these statutes is limited to acts of a defendant under color of state legislation (*California Oil and Gas Co. v. Miller*, 96 Fed. 12, 22.) There is no allegation that in construing the purported collective bargaining agreement and in employing members of the IATSE to erect sets on stages the Motion Picture Companies acted under color of any state legislation. In the absence of such allegation, 8 U. S. C. A. 43 and 28 U. S. C. A.

41(14) did not confer jurisdiction upon the District Court in this case.

In Paragraph VIII of plaintiff's complaint, it is alleged that jurisdiction depends upon 8 U. S. C. A. 47 and 28 U. S. C. A. 41(12). At page 53 and following of their brief, appellants allege that these statutes conferred jurisdiction upon the District Court in this case. These statutes protect persons from violation of their rights by state action, not by individual action (*Love v. Chandler* (C. C. A. 8), 124 F. (2d) 785, 786-7; *Simpson v. Geary*, 204 Fed. 507; *Mitchell v. Greenough*, (C. C. A. 9), 100 F. (2d) 184, 187. The allegations of plaintiff's complaint are that appellee Motion Picture Companies have employed members of the IATSE instead of members of the Carpenters Union to erect sets on stages, and that such action on their part is a violation of a purported collective bargaining agreement. Such alleged wrongful action by appellee Motion Picture Companies is individual action on their part and is not state action. There is no allegation that plaintiffs have suffered by reason of any state action. State action is in no way involved in this case. In the absence of any allegation that plaintiffs have suffered by reason of state action, jurisdiction in this case cannot depend upon 8 U. S. C. A. 47 or 28 U. S. C. A. 41(12).

VI.

Plaintiffs Cannot Rely Upon the Provisions of the Sherman Act to Establish Jurisdiction in This Case.

1. The Amended Complaint Contains No Allegations Even Purporting to Charge a Combination or Conspiracy in Restraint of Trade.

(a) THE FIRST CAUSE OF ACTION CONTAINS NO SUCH ALLEGATIONS.

As stated by plaintiffs in the amended complaint, the controversy involved in the first cause of action is as follows:

“The controversy alleged herein arises from the acts and conduct of defendants I.A.T.S.E., Walsh, and Brewer in claiming, demanding, and enforcing, by coercion and other devices, including the threat to close every motion picture theatre on the continent by calling out on strike all moving picture projectionists belonging to said union, their claim to the right to provide members of I.A.T.S.E. and non-union ‘permittees’ of said union to do the work allocated to plaintiffs by the aforesaid Decision and Award and the clarification thereof, by historical custom and usage, and by the terms and provisions of agreements alleged hereinbefore, and the accession to said demands and the employment of members and ‘permittees’ of the I.A.T.S.E. to do the work of plaintiffs by defendant Motion Picture Companies.” [Tr. of R. p. 20.]

This conduct is alleged to be in violation of certain contracts and decisions, findings and awards in arbitration. It is not alleged to have had the purpose of nor the result of restraining trade or commerce among the states either by controlling prices or lessening competition or in any other manner whatsoever.

(b) THE SECOND CAUSE OF ACTION CONTAINS NO SUCH ALLEGATIONS.

The second cause of action, in the language of the amended complaint, charges a conspiracy:

“. . . to deprive plaintiffs of having and exercising and to injure plaintiffs in their persons and property in the *exercise of, rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States*, in that said defendants conspired and continue to conspire each with the other to deprive plaintiffs of the right and privilege to work at their chosen vocations, to-wit: studio carpenters, and to interfere with, obstruct, impede, and hinder said plaintiffs in the free and unhampered exercise of said right and privilege; that said conspiracy has resulted and continues to result in great damages to plaintiffs in the loss of wages.” [Tr. of R. pp. 22-23.]

There are no allegations charging a concurrent purpose to control prices, eliminate competition or otherwise restrain trade and no results of such conspiracy are set forth other than that plaintiffs have suffered loss of wages.

(c) LACKING ANY ALLEGATIONS THAT EITHER THE PURPOSE OR THE RESULT OF THE COMBINATION AND CONSPIRACY CHARGED IS TO EFFECT "COMPETITION IN THE MARKETING OF GOODS AND SERVICES" NEITHER THE FIRST NOR THE SECOND CAUSE OF ACTION RAISES ANY ISSUE UNDER THE SHERMAN ACT.

If any of the allegations of the complaint charge an attempt to establish or the establishment of a monopoly of any sort, the monopoly involved is a labor monopoly and is therefore not prohibited by the Sherman Act which concerns only combinations which affect "competition in the marketing of goods or services."

In *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, the Court, holding that a sitdown strike was not a Sherman Act violation, said:

"It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to *restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of public injury." (pp. 491-493.)

“A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a ‘restraint of trade.’ Since the enactment of the declaration in §6 of the Clayton Act that ‘the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the anti-trust laws,’ it would seem plain that restraints on the sale of the employee’s services to the employer, *however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce* under the Sherman Act.” (pp. 502-503.)

The question of union immunity involved in *Allan Bradley Co. v. Union* (1945), 325 U. S. 797, and similar cases is in no way raised by the amended complaint in the absence of the statement of any facts therein even intimating that “understandings, looking not merely to terms and conditions of employment but also to price and market control,” as the court described the agreements in that case, are involved.

That plaintiffs did not consider any Sherman Act issue to be raised by the amended complaint is indicated by the fact that though numerous Federal statutes are alleged therein to be the basis of the Court’s jurisdiction, the Sherman Act is not mentioned.

2. Having Failed to Include a Statement in the Complaint to the Effect That the Sherman Act Was a Ground of Jurisdiction, as Required by Rule 8(a)(1) of the Federal Rules of Civil Procedure, Appellants Are Now Precluded From Attacking the District Court's Ruling if in Fact the Grounds of Jurisdiction Stated Did Not, and It Is Respectfully Submitted That They Did Not, Show Jurisdiction in the Court.

Appellants set forth the grounds of jurisdiction in Paragraph VIII of the amended complaint in the following manner:

“Jurisdiction of this Court is vested by virtue of Section 400, Title 28, United States Code Annotated; Sections 41(1), 41(8), 41(12), and 41(14), Title 28, United States Code Annotated; Section 729, Title 28, United States Code Annotated; Sections 43 and 47(3), Title 8, United States Code Annotated; Section 157, Title 29, United States Code Annotated; and the Constitution of the United States, Amendments V and XIV.” [Tr. of R. p. 7.]

Conspicuously absent from the long list of Federal statutes and Constitutional amendments cited is the Sherman Act. Rule 8(a)(1) of the Federal Rules requires that the complaint contain “(1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . .” Having failed to invoke the jurisdiction of the District Court in the manner prescribed by this rule with respect to this ground of jurisdiction, now first raised on appeal, appellants cannot now assert that the District Court erred in failing to sustain jurisdiction on this ground.

VII.

The Federal Declaratory Judgment Act Is Applicable Only to Cases Within the Jurisdiction of the Federal Court; It Does Not Confer Jurisdiction Where None Otherwise Exists.

At pages 31 to 38 of appellant's brief it is contended that the jurisdiction of the District Court in this case is based on the Declaratory Judgment Act. It is well settled that the Declaratory Judgment Act is a procedural statute applicable to cases within the jurisdiction of Federal Courts and not a statute conferring jurisdiction.

Aetna Casualty & Surety Co. v. Quarles (C. C. A. 4), 92 F. (2d) 321, 323:

“The federal Declaratory Judgment Act (Jud. Code §274d, 28 U. S. C. A. §400) is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction.”

In *Mississippi Power & Light Co. v. City of Jackson* (C. C. A. 5), 116 F. (2d) 924, cited by appellants, the court said:

“While the declaratory judgment act has not added to the jurisdiction of the federal courts, it has added a greatly valuable procedure of a highly remedial nature.”

See also:

Samuel Goldwyn, Inc. v. United Artists Corporation (C. C. A. 3), 113 F. (2d) 703, 708;

McCarty v. Hollis (C. C. A. 10), 120 F. (2d) 540, 542;

Home Ins. Co. v. Trotter (C. C. A. 8), 130 F. (2d) 800.

Appellants must look to some statute, other than the Declaratory Judgment Act, on which to base a claim of jurisdiction in the District Court.

Conclusion.

It is respectfully submitted that the District Court correctly decided that in the absence of diversity of citizenship, it was without jurisdiction to declare the rights and duties of the parties to the purported agreements described in plaintiffs' complaint.

Respectfully submitted,

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No. 11653.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR SCHATTE, RAYMOND E. CONAWAY, ANDREW M. ANDERSON, CHARLES L. DAVIS, HARRY BEAL, ARTHUR DJERF, EWALD K. ALBRECHT, HARRY L. TALLEY, HARRY DAVIDSON, JOHN L. KIERSTEAD, THOMAS W. HILL, LLOYD C. JACKSON, ALFRED J. WITHERS, JOHN H. ZELL, and EDWARD DERHAM, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANTS.

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Appellees.

REPLY BRIEF OF APPELLANTS.

Request for Judicial Notice.

Appellees IATSE, Walsh and Brewer, at page 63 of their brief, have requested the court to take judicial notice of *Schatte, et al. v. International Alliance, etc., et al.*, No. 7304-PH, filed in the United States District Court at Los Angeles on July 2, 1947, as follows:

“It is further submitted that this court has the right to take judicial notice of actions pending in the various district courts of the United States comprising the 9th Circuit, that involve the identical liti-

gation that is here presented, and we therefore ask this court to take judicial notice of the action of *Oscar Schatte, et al. v. International Alliance, etc., et al.*, being No. 7304-PH in the office of the Clerk of the District Court of the United States in and for the Southern District of California, Central Division, which said action was filed on July 2, 1947. In that action, certain of the plaintiffs in this action are plaintiffs there and the defendants herein are made defendants therein. The plaintiffs in that action have specifically pleaded and have specifically attempted to set forth causes of action under the Federal Anti-Trust Laws and under the Labor Management Relations Act based on the same factual situation here concerned. * * *

Appellants consent for the court to take judicial notice of said suit, and are ready, at the court's pleasure, to present herein printed copies of the amended and supplemental complaint filed therein on October 20, 1947, which will show:

1. That the plaintiffs, who are appellants here, and others, are the plaintiffs there; and that all appellees here, without others, are the defendants there.

2. That said suit is for damages only, and is in three counts, under the Taft-Hartley, Civil Rights, and Sherman Acts, respectively, while this case on appeal is for Declaratory Relief alone.

3. That said new action contains allegations of material and substantial facts that existed before the suit on appeal was filed, but that were first disclosed before the Congressional Sub-committee, of the House Committee on Education and Labor, in hearings at Los Angeles during August and September, 1947, and also contains al-

legations of material and substantial developments subsequent to the effective dates of the Taft-Hartley Act.

It is respectfully submitted that the foregoing may be properly considered by this Honorable Court upon the sole issue involved in this appeal, of Federal jurisdiction, without diversity of citizenship, in cases arising under the Constitution and laws of the United States.

I.

Appellants' Constitutional Right to Work: Under Their Long-Standing Employment, and Concurrent Collective Bargaining Agreement.

Reference is made to the opening brief, page 30, for the statement of this proposition, and to the case there quoted. The following is added in reply to appellees' briefs.

Reference is also made to the statement of the case in the opening brief, showing:

The Carpenters' historic employment and right to carpenters' work (Op. Br. p. 10);

The Carpenters' collective bargaining agreement (Op. Br. p. 10);

The Carpenters' long-standing contracts of July 9, 1921, with the appellee IATSE, acknowledging the Carpenters' right to carpenters' work (Op. Br. p. 11);

The arbitration agreement to determine differences between the Carpenters and the IATSE, and appellee Companies and Association, in the administration of said contracts (Op. Br. p. 12);

The arbitration report of December 26, 1945 (Op. Br. p. 14), as clarified by the arbiters on August 16, 1946 (Op. Br. p. 16);

The compliance with the award and clarification by the Carpenters (Op. Br. p. 17);

The violation of the contracts and arbitration award and clarification, by appellees (Op. Br. pp. 15, 17, 18);

The conspiracy between the IATSE and the appellee Companies, and Association, in violation of the contracts and award as clarified (Op. Br. pp. 20-23).

Appellants' Individual Rights Under Contracts.

J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762, was quoted in the opening brief (p. 48). It is now more fully quoted, point by point, first relative to the contract, at 766:

“Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit.”

It is submitted that the present Exhibit “A” interim agreement, which specifically covers “wage scales, hours of employment, and working conditions” [R. 33], measures to this standard, to “govern hiring and work and pay in that unit.”

The opinion then states the relation of collective bargaining agreements to individual employment, at 766:

“The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone.”

Said allegations in the present case show that the employment ran concurrently with said successive and continuous collective bargaining agreements.

The opinion continues, in its statement of the rights of the individual employee under collective bargaining agreements, at 766:

“The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established * * *.”

This language establishes the rights of the individual carpenter employees under their current Exhibit “A” collective bargaining agreement.

The Court then determined the issue in this case, by holding that these rights arise “by virtue of,” that is, under the laws of the United States, in the language we italicize, as follows:

*“But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, * * *.”* (Italics ours.)

Appellants' Right of Action.

Gaskill v. Roth, 151 F. (2d) 366, contains the following concise statement of the rights of appellants, and the class for whom they sue, under said collective bargaining contract, and of their right of action for its breach, at 371:

“Through the diligence of counsel our attention has been directed to all of the many cases involving the right of railroad employees to maintain action in the courts as individuals or through unions or as members of a class claiming rights under the collective bargain agreements negotiated as contemplated by the Railway Labor Act, 45 U. S. C. A., §151 *et seq.*, and they have been considered. *But in this case the trial court fully recognized the plaintiffs' right to sue the railroad upon the collective bargain agreement ('A' and 'B') and declared as the law that when a collective bargain has been duly established the carrier is not at liberty, so long as the bargain exists, to violate it.*” (Italics ours.)

Certiorari was denied April 1, 1946, 327 U. S. 798, 90 L. Ed. 1024. A rehearing on the petition for certiorari was denied August 29, 1946, 328 U. S. 879, 90 L. Ed. 1645.

This case, establishing the principle that the employer is not at liberty, so long as the collective bargaining contract exists, to violate the contract, and that the employees have a right of action based upon its violation, was an

“Action by Barney E. Gaskill and others against Claude A. Roth, trustee of the property of the Chicago & North Western Railway Company, and others, for a declaratory judgment regarding plaintiffs' rights under contract with the defendant railroad.”

II-III.

II. Declaratory Relief Proper Remedy to Determine Rights and Obligations of Parties Under Contracts, Including Collective Bargaining Agreements; and

III. Including Motion Picture Collective Bargaining and Employment Contracts.

Reference is made to the opening brief, at pages 31-34, and 35-38, respectively, for the statement and discussion of these propositions.

Reference is made to the following paragraphs of the Complaint [R. 8, 20]:

Paragraphs XII [R. 8], XXXII and XXXIII [R. 20], of the Complaint, allege the controversy that has arisen since the Exhibit "D" December 26, 1945, arbitration award [R. 42], and Exhibit "F" August 16, 1946, clarification thereof [R. 57], were made by the American Federation of Labor, acting by and through its Executive Council, and Three-Man Committee thereof.

Paragraph XXXIV [R. 21], alleges the public interest involved.

Paragraphs II to VIII, inclusive, of the second cause of action [R. 22-27], allege the conspiracy between each and all appellees:

"* * * to injure plaintiffs in their persons and property in the exercise of rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States, in that said defendants conspired and continue to conspire each with the other to deprive plaintiffs of the right and privilege to work at their chosen vocation, to-wit: studio carpenters, and to interfere with, obstruct, impede, and

hinder said plaintiffs in the free and unhampered exercise of said right and privilege; that said conspiracy has resulted and continues to result in great damages to plaintiffs in the loss of wages.”

If the court takes judicial notice of case No. 7304-PH, as requested by appellees IATSE, *et al.*, in their answer brief (p. 63), and as consented to by appellants (*supra*, 1-3), reference is also made to paragraphs XI to XXVIII, inclusive, of the amended and supplemental complaint therein (pp. 6-35), showing the new developments that will be embodied in an amended and supplemental complaint herein, if and when this case is remanded.

Reference is now made to the cases hereinbefore quoted, and to the cases quoted in the opening brief, at the pages indicated, showing that declaratory relief is the proper remedy in this case:

Gaskill v. Roth (supra);

Peoples Bank v. Eccles, 64 Fed. Supp. 811 (O. B. 31);

Mississippi Power & Light Co. v. City of Jackson, et al., 116 F. (2d) 924, at 925 (O. B. 32);

Oil Workers International Union, etc. v. Texoma Natural Gas Co., 146 F. (2d) 62, at 65 (O. B. 34);

Columbia Pictures Corp. v. DeToth, 26 Cal. (2d) 753, 756 (O. B. 35), as also reported in 162 A. L. R. 743 (O. B. 36);

Loew's Incorporated v. Basson, et al., 46 Fed. Supp. 66 (O. B. 37), as quoted more fully in the appendix of the opening brief (pp. 8-16).

IV. Jurisdiction Under National Labor Relations Act;
V. In This Case Where Actions Complained of Con-
stitute an Attempt to Nullify Act.

Reference is made to the opening brief, at pages 39-50, and 51-52, respectively, for the statement and discussion of these propositions.

National Labor Relations Act, Section 7, 29 U. S. C. A. 157:

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

Reference is now made to the following cases, showing the jurisdiction of Federal courts in cases arising under the Constitution and laws of the United States:

J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332, 64 S. Ct. 576, 88 L. Ed. 762, at 766 (O. B. 48);

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (O. B. 49, 50);

American Federation of Labor, et al., v. J. Tom Watson, et al., 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873, at 878 (O. B. 52).

Appellee companies on page 3 of their brief, cite and quote *Shulthis v. McDougal*, 225 U. S. 561, 569, 56 L. Ed. 1205, at 1211, as follows:

“A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.”

The present case does involve the construction, effect, and very life purpose of the Act, as has been shown.

Cleveland C. C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 848, at 851, discloses the significance of the *Shulthis* case, as follows:

“* * * although the amended bill does not in all respects strictly comply with the rule touching jurisdictional averment, yet we think enough is definitely stated, without resorting to argumentative inference (*Schulthis v. McDougal*, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205), to show that the controversy arises in material part under the Interstate Commerce Act. Since a correct decision of the case must depend on the construction of portions of that law, jurisdiction of the court below sufficiently appears. The familiar rule laid down by Chief Justice Marshall (*Cohens v. Virginia*, 6 Wheat. at 379, 5 L. Ed. 257) furnishes the answer to this feature of the demurrer:

“‘A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.’

“So in *Tennessee v. Davis*, 100 U. S. 257, 264 (25 L. Ed. 648), the court said:

“‘Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.’”

The present case measures to all these requirements. The rights of appellants, as plaintiffs, arose “by virtue of the Labor Relations Act,” and therefore have the standing in law determined in *J. I. Case Co. v. National Labor Relations Board* (*supra*, 4-5).

The action of appellees, as conspiring defendants, in seeking to abrogate the employment, and the collective bargaining contract, made and now existing under the Act, is the basis for “plaintiffs’ right to sue,” as determined in *Gaskill v. Roth* (*supra*, 6).

ARBITRATION REMEDY EXHAUSTED.

Appellants have exhausted their remedy before the American Federation of Labor, to which both Unions belong, and have received an award from the Committee named by and representing the A. F. of L. (O. B. 14, 44), and a clarification thereof by said Committee (O. B. 16, 46),

entitling them, as carpenters, to do the carpenters' work in the studios, and on the lots and locations, of the appellee Motion Picture Companies, in accordance with their employment, their collective bargaining contract, and their historic allocation of work.

NO ADEQUATE ADMINISTRATIVE REMEDY AVAILABLE.

There is no adequate administrative remedy available to protect these rights of appellants from the conspiracy of appellees to abrogate their employment, and their collective bargaining agreement under the Act, and to thereby, in effect, nullify the Act itself, in so far as it relates to these appellants and their rights. It is submitted, therefore, that there can be no question of the court's jurisdiction.

Steele v. Louisville & Nashville R. R. Co., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, at 182, has been quoted in the opening brief (pp. 49-50). It is again quoted in part, and we submit in relevancy, as follows:

“In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. The right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction. * * * there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford

a remedy for a breach of statutory duty are left unaffected. The right is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & N. O. R. Co., Brotherhood of R. & S. S. Clerks, supra* (221 U. S. 556, 557, 560, 74 L. Ed. 1039, 1041, 50 S. Ct. 427), and in *Virginia R. Co. v. System Federation, R. E. D., supra* (300 U. S. 548, 81 L. Ed. 799, 57 S. Ct. 592), and like it is one for which there is no available administrative remedy.”

ADMINISTRATIVE FINDING NOT A PREREQUISITE.

Earl Moore v. Illinois Central Railroad Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1039, at 1092:

“But respondent says that there is another reason why the judgment in its favor should be sustained. This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore’s suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act (May 20, 1926) 44 Stat. at L. 577, chap. 347, as amended June 21, 1934), 48 Stat. at L. 1185, chap. 691, 45 U. S. C. A. * * * 151 *et seq.* But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * *.”

VI.

Jurisdiction Under Constitutional and Civil Rights Act.

Reference is made to the opening brief, at pages 53 to 57, for the statement and discussion of this proposition, and to page 30 for the statement on the right to work, and to the following cases as there quoted:

Nissen v. International Brotherhood of Teamsters, etc., et al., 229 Iowa 1028, 295 N. W. 858; 141 A. L. R. 598, at page 614 (O. B. 30);

Steele v. Louisville & Nashville R. R. Co. (*supra*; O. B. 49-50);

American Federation of Labor v. Tom Watson (*supra*; O. B. 52);

Picking v. Pennsylvania R. Co., 151 F. (2d) 240, at 244 (O. B. 53);

Bartling v. C. I. O., 40 Fed. Supp. 366 (O. B. 55);

Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, at 1327 (O. B. 56).

If the court takes judicial notice of No. 7304-PH (*supra* 1-3), reference is also made to the second count of the amended and supplemental complaint therein, and to paragraphs XI to XXVIII of the first count, as therein adopted, particularly to page 26, lines 9 to 13, inclusive, and lines 30 to 32, inclusive.

VII.

Jurisdiction Under Sherman Anti-Trust Act.

Reference is made to the opening brief, at pages 58 to 62, for the statement and discussion of this proposition, and to the answer brief of appellees IATSE, *et al.*, at page 63, for the statement hereinbefore quoted (*supra* 1-3).

From appellees' statement that a cause of action arising under the Sherman Act has been pled in said suit No. 7304-PH, it is respectfully submitted that the court should assume that it has been adequately pled, and that the court has jurisdiction thereunder. If the court takes judicial cognizance of said case No. 7304-PH, reference is made to the third count therein, pages 37 to 40, inclusive.

Attention is called to the cases cited in the opening brief:

Loew's, Incorporated v. Basson, et al., 46 F. Supp. 66, as quoted extensively in the appendix to the opening brief (pp. 8-16), where federal court jurisdiction was asserted and established by Loew's, Incorporated, one of the defendants here, as plaintiff there.

Allen Bradley Company, et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al., 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939, at 1942 (O. B. 60), where federal court jurisdiction was likewise established, and upheld by the Supreme Court.

VIII.

Jurisdiction Under the Labor-Management Relations Act of 1947. (Taft-Hartley Act.)

Reference is made to the opening brief, at pages 63 to 67, for the statement and discussion of this proposition. Section 301(a) (O. B. 64), gives federal court jurisdiction, while Section 303(a) (O. B. 65), gives the statutory causes of action.

The Taft-Hartley Bill was enacted after the order of dismissal, and appeal, in this case, but we submit the jurisdiction given by it applies to this case under the following authority:

Federal Deposit Ins. Corporation v. George-Howard, 153 F. (2d) 591, at page 593 (O. B. 66).

Ziffrin v. United States, 318 U. S. 73, 87 L. Ed. 621, at 625:

“A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 85 L. ed. 327, 61 S. Ct. 347, and cases cited. *Cf. Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 464, 65 L. ed. 349, 355, 41 S. Ct. 172, 16 A. L. R. 196.”

Public Utilities Com. v. United Fuel Gas Co., 317 U. S. 456, 63 S. Ct. 369, 87 L. Ed. 396, at 402:

“It is familiar doctrine that an appeal in an equity suit opens up inquiry as of the time of the ultimate decision. To decide this appeal on the basis of a legal situation that ceased to exist not only prior to the taking of this appeal but also before issue was finally joined in the District Court, would be to make a gratuitous advisory judgment. It is the case that is here now that must be decided, and it must be

decided on the basis of the circumstances that exist now. Cf. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 542, 543, 85 L. ed. 327, 329, 330, 61 S. Ct. 347, and cases there cited.”

Vandenbark v. Owens-Illinois Glass Company, 311 U. S. 538, 61 S. Ct. 347, 85 L. Ed. 327, at 329:

“While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees. It has vacated judgments of state courts because of contrary intervening decisions, and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it. Where, after judgment below, a declaration of war changed the standing of one litigant from an alien belligerent to an enemy, this Court took cognizance of the change and modified the action below because of the new status.”

Federal Reserve Bank of Richmond v. Kalin, 77 F. Rpt. (2d) 50, at 51:

“* * * It is clear that the grant of jurisdiction given by the statute applies to causes of action in existence at the time of its passage as well as to those subsequently arising ‘Statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before.’ *Link v. Receivers of Seaboard Air Line Ry. Co.* (C. C. A. 4th), 73 F. (2d) 149, 151; *Hallowell v. Commons*, 239 U. S. 506, 36 S. Ct. 202, 60 L. Ed. 409; *Baltimore & P. R. Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231.

“For the reasons stated, we think that the court below had jurisdiction of the action, and that the order dismissing it should be reversed.”

Conclusion.

Reference is made to the conclusion in the opening brief, at pages 68 to 70.

It is respectfully submitted:

That the public interest, at this critical time in our country's history, requires a clear-cut, judicial determination that no industry is big enough, that no labor organization is strong enough, and that no combination is powerful enough to nullify the laws of the United States. (O. B. 52.)

That court interpretation of the rights and responsibilities of all concerned, in fairness to all, is essential to replace the law of the jungle, arising from the conspiracy of the appellees, with the law of the land, in Hollywood labor-management relations.

That there is no remedy available, or sufficient, as a substitute for court action. That determination of the rights and responsibilities of all concerned, by declaratory judgment, is the right and most expeditious remedy.

That, if the declaratory judgment goes unheeded, and is treated with the same contempt as the award and clarification rendered by the American Federation of Labor has been treated, then, perhaps, those who hold themselves above law could be brought within the realm of law by the use of a Special Master.

Respectfully submitted,

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Attorney for Appellants.

No. 11656

United States
Circuit Court of Appeals

For the Ninth Circuit

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

NOV 11 1947

PAUL P. O'BRIEN,

CLERK



No. 11656

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 30449-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VINCENT BRUNO, FRANK FLIER, SALVA-
TORE BILLECI, RENALDO FERRARI,
RICHARD BENSON, MIKE J. BILLECI,
JOHN CHRISTOPHER, JOHN ORMAN
KNIGHT, JOSEPH PITTA, SAMUEL
LOUIS COHEN, STANLEY PALIWODA,
HENRY GOURDIN, MILLARD DAVIS,
PAUL CRIVELLO, JOHN TERNULLO,
HARRY FISHER, and FRANK ARRIOLA,
Defendants.

INDICTMENT

First Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury charges: That Vincent Bruno and Renaldo Ferrari, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle con-

taining approximately one dram of heroin, and the said heroin had been imported [2*] into the United States of America contrary to law, as said defendants then and there knew.

Second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Salvatore Billeci, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Third Count

(Harrison Narcotic Act, 26 U.S.C.,
Secs. 2553 and 2557)

The Grand Jury further charges: That Frank Flier, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin.

* Page numbering appearing at foot of page of original certified Transcript of Record.

Fourth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Millard Davis, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Salvatore Billeci and Millard Davis, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Sixth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and Salvatore Billeci, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as nine bindles containing approximately nine drams of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Seventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 6th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one package containing approximately one ounce of heroin, and the said herein had been imported into the United States of America contrary to law, as said defendants then and there knew.

Eighth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges, That Vincent Bruno, on or about the 7th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Ninth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 7th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Tenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 7th day of January, 1946,

in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Eleventh Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twelfth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Richard Benson, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal

and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Thirteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fourteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described

as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Sixteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did [7] conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Seventeenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Eighteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 9th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Nineteenth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Flier, on or about the 10th day of January, 1946, in the City and County of [8] San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twentieth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and John Orman Knight, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-First Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Mike J. Billeci, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-Second Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier and Mike J. Billeci, [9] on or about the 8th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-Third Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Joseph Pitta, on or about the 10th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-Fourth Count

(Jones-Miller Act, 21 U.S.C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Joseph Pitta and Millard Davis, on or about the 11th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew. [10]

Twenty-fifth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 11th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Twenty-sixth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-seventh Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bundle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Twenty-eighth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bundle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Twenty-ninth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank

Flier and John Orman Knight, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirtieth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Christopher, on or about the 14th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-first Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of

California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Thirty-second Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That John Orman Knight, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Thirty-third Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and Harry Fisher, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and

preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-fourth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Vincent Bruno and Frank Arriola, on or about the 15th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-fifth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier and John Orman Knight, on or about the 16th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a

lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-sixth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-seventh Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Christopher, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle con-

taining approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-eighth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Christopher, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Thirty-ninth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and Renaldo Ferrari, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the

said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Fortieth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier and Renaldo Ferrari, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-first Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Vincent Bruno, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Forty-second Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Forty-third Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 29th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Forty-fourth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank

Flier and John Orman Knight, on or about the 30th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-fifth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and Samuel Louis Cohen on or about the 30th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-sixth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and John Orman Knight, on or about the 31st day of January, 1946, in the City and County of

San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-seventh Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and Stanley Paliwoda, on or about the 1st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-eighth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier, John Orman Knight and Henry Gourdin, on or about the 1st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facili-

tate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Forty-ninth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier and Henry Gourdin, on or about the 1st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Fiftieth Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Frank Flier, on or about the 2nd day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to

wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifty-first Count

(Harrison Narcotic Act, 26 U. S. C., Secs. 2553 and 2557)

The Grand Jury further charges: That Frank Flier, on or about the 2nd day of February, 1946, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin.

Fifty-second Count

(Jones-Miller Act, 21 U. S. C., Section 174)

The Grand Jury further charges: That Millard Davis, on or about the 2nd day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifty-third Count

Harrison Narcotic Act, 26 U. S. C., Secs. 2553
and 2557)

The Grand Jury further charges: That Frank Flier, on or about the 3rd day of February, 1946, in the City and County of San Francisco, State of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin.

Fifty-fourth Count

(Jones-Miller Act, 21 U.S.C. Section 174)

The Grand Jury further charges: That Stanley Paliwoda, on or about the 3rd day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew.

Fifty-Fifth Count

(Jones-Miller Act, 21 U.S.C. Section 174)

The Grand Jury further charges: That Vincent Bruno, Frank Flier, Salvatore Billeci, Renaldo

Ferrari and Samuel Louis Cohen, on or about the 21st day of February, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

Fifty-sixth Count

(Conspiracy, 18 U.S.C. Section 88)

The Grand Jury further charges: That Vincent Bruno, Frank Flier, Salvatore Billeci, Renaldo Ferrari, Richard Benson, Mike J. Billeci, John Christopher, John Orman Knight, Joseph Pitta, Samuel Louis Cohen, Stanley Paliwoda, Henry Gourdin, Millard Davis, Paul Crivello, John Ternullo, Harry Fisher, and Frank Arriola at a time and place to the said Grand Jury unknown, did feloniously conspire together and with other persons whose names are to said Grand Jury unknown, to receive, conceal, buy, sell and facilitate the transportation and concealment of a derivative and preparation of morphine, to-wit, heroin, which had been imported into the United States of America contrary to law, as said defendants then and there knew, in violation of Section 174, Title 21, United States Code; that thereafter and during the exist-

ence of said conspiracy, one or more of said defendants hereinafter mentioned by name, in the City and County of San Francisco, State of California, within said Division and District, and at other places as hereinafter alleged, did the following acts in furtherance of and to effect the object of the conspiracy aforesaid:

1. On January 5, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Vincent Bruno removed a bindle of heroin from underneath a beer case. At that time and place he held a conversation with the defendant Salvatore Billeci.

2. On February 6, 1946, the defendants Vincent Bruno and Salvatore Billeci left the United States of America and entered the United States of Mexico at Calexico, California.

3. On January 12, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Frank Flier held a conversation with the defendant Millard Davis.

4. On January 6, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Frank Flier received an unknown amount of currency from the defendant Millard Davis.

5. On January 6, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of [22] San Francisco, State of California, the defendant Salvatore Billeci poured the contents of eight or nine bindles of heroin into another package.

6. On February 2, 1946, the defendants Salvatore Billeci and Vincent Bruno entered the United States of America from the United States of Mexico at Calexico, California.

7. On March 1, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Renaldo Ferrari held a conversation with the defendants Vincent Bruno and Frank Flier, and at that time the defendant Renaldo Ferrari received an unknown amount of currency from the defendant Frank Flier.

8. On January 8, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Richard Benson removed a bindle of heroin from the shelf of the storeroom.

9. On January 10, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Mike J. Billeci had a conversation with the defendants Frank Flier and Vincent Bruno.

10. On January 17, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Christopher held a conversation with the defendant Frank Flier.

11. On January 14, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Orman Knight held a conversation with the defendant Frank Flier.

12. On January 15, 1946, at the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Orman Knight [23] removed a bindle of heroin from a fuse box in the hallway and put the bindle in his pocket.

13. On January 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Joseph Pitta held a conversation with the defendants Vincent Bruno and Frank Flier.

14. On January 31, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Samuel Louis Cohen received a bindle of heroin from the defendant Frank Flier.

15. On February 1, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Stanley Paliwoda had a conversation with the defendant Frank Flier.

16. On February 13, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Stanley Paliwoda had a conversation with the defendant Vincent Bruno.

17. On February 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Henry Gourdin had a conversation with the defendants Frank Flier, John Orman Knight and Vincent Bruno.

18. On January 12, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Millard Davis held a conversation with the defendant Frank Flier.

19. On February 2, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Millard Davis [24] received a bundle of heroin from the defendant Frank Flier and concealed it on his person.

20. On January 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Paul Crivello received an unknown amount of currency from the defendant Frank Flier.

21. On February 11, 1946, at the premises known as the Star Dust Bar, at 1098 Sutter Street, in said

City and County of San Francisco, State of California, the defendant John Ternullo had a conversation with the defendants Vincent Bruno, Renaldo Ferrari and Frank Arriola. Thereafter, on the same day, he drove in his automobile to the vicinity of Geary and Divisadero Streets, in the City and County of San Francisco, State of California.

22. On February 26, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant John Ternullo had a conversation with the defendant Frank Flier.

23. On January 15, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Harry Fisher received a bindle of heroin from the defendant Frank Flier.

24. On February 11, 1946, in the premises known as the Star Dust Bar, at 1098 Sutter Street, in said City and County of San Francisco, State of California, the defendant Frank Arriola had a conversation with the defendants Vincent Bruno, Renaldo Ferrari and John Ternullo.

A True Bill.

ARTHUR J. KAHN,
Foreman.

/s/ FRANK J. HENNESSY,
United States Attorney.

(Approved as to form: R. B. McM.)

[Endorsed]: Filed Sept. 18, 1946. [25]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 10th day of October, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

ARRAIGNMENT OF DEFENDANT

This case came on regularly this day for entry of plea. The defendants were present in proper person and with their respective counsel: Roger Brame, Esq., for defendant Joseph Pitta; and Sol A. Abrams, Esq., and William Sullivan, Esq., appearing for James MacInnis, Esq., attorney for defendant Renaldo Ferrari. Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

On motion of Mr. Colvin, the defendants were called for arraignment. The defendants were informed of the return of the Indictment by the United States Grand Jurors, and asked if they were the persons, among others, named therein and upon their answer that they were and that their true names were as charged, thereupon counsel for

defendants waived the reading of the Indictment. Copy of Indictment was handed to each defendant who stated that he understood the charge against him.

After hearing the attorneys, it is ordered that this case be continued to November 25, 1946, for submission of motions for separate trial and to plead.

Further ordered that the defendants be released on their own [26] recognizance in this case, the attorneys herein having been heard in this regard.

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes Now Renaldo Ferrari, one of the defendants in the above entitled matter, and moves this court for its order, compelling plaintiff herein to furnish him with a bill of particulars setting forth dates, times, places, occurrences, means, and any and all other reasonable descriptions in connection with the accusations made against him herein.

This motion is based upon all the files and documents bearing the above title and number, and is addressed to the sound discretion of this court, upon the ground that the accusations now lodged against this defendant are too vague, uncertain, general and indefinite to enable him to prepare a defense thereto or indeed, to enter a plea herein; and further, that said accusations as couched in said indictment, are too vague, indefinite, general and uncertain to

enable defendant to plead an acquittal in said cause in response to any subsequent prosecution which might be brought against him.

Dated, November 27, 1946.

VINCENT W. HALLINAN,
JAMES MARTIN MacINNIS,
Attorneys for Defendant
Renaldo Ferrari.

[Endorsed]: Filed Dec. 2, 1946. [28]

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT

(Rules of Criminal Procedure, Rule 12,
Subd. B, Paragraph 2)

Comes Now Renaldo Ferrari, one of the above defendants herein, and moves this court to dismiss said indictment upon the following grounds:

1. Said indictment fails to show jurisdiction in the court;
2. Said indictment fails to charge an offense;
3. Said indictment is so vague, indefinite and uncertain with respect to times, places and persons, and as to the means by which any of the acts alleged to have been participated in by this defendant, that he is not informed of the nature and cause of such accusations, and is unable to prepare his defense thereto, or to plead an acquittal or conviction thereof as a bar to a subsequent prosecution.

4. The prosecution of this defendant under said indictment would violate the rights secured him by the Sixth Amendment to the Constitution of the United States.

5. The prosecution of this defendant under said indictment would violate the rights secured him by the Fifth Amendment to the Constitution of the United States.

Dated, November 27, 1946.

VINCENT W. HALLINAN,
JAMES MARTIN MacINNIS,
Attorneys for Defendant
Renaldo Ferrari.

(Points and authorities in support of foregoing motion.)

[Endorsed]: Filed Dec. 2, 1946. [29]

[Title of District Court and Cause.]

MOTION OF DEFENDANT FOR ORDER
GRANTING SEVERANCE OF JURY TRIAL

Comes Now the Defendant Renaldo Ferrari, and moves this Court for its order, granting him a severance of his trial by jury herein, to the end that he will not be compelled to stand trial in one cause with all of the defendants mentioned in the indictment herein.

This motion will be based upon all the files and documents bearing the above entitled number and title, will be addressed to the sound discretion of

the court pursuant to the new Rules of Criminal Procedure, and will be based upon the further ground that the indictment herein contains fifty-six (56) counts, and that the fifty-sixth count of said indictment contains twenty-six (26) sub-counts making a total of eighty (80) separate allegations of fact; against said eighty (80) allegations of fact, all of which will be put in issue herein at the time of the entering of pleas to said indictment, this moving defendant, Renaldo Ferrari, is accused in only seven (7) allegations thereof.

Dated, November 27, 1946.

VINCENT W. HALLINAN,
JAMES MARTIN MacINNIS,
Attorneys for Defendant
Renaldo Ferrari.

[Endorsed]: Filed Dec. 2, 1946. [30]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 2nd day of December, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

HEARING ON MOTION FOR SEPARATE
TRIALS, PLEA OF "NOT GUILTY," MO-
TIONS TO DISMISS AND FOR BILL OF
PARTICULARS AS TO CERTAIN DE-
FENDANTS DENIED

This cause came on regularly this day for hearing on motion for separate trials, also for entry of plea of defendants Vincent Bruno, et al. Daniel C. Deasy, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendants herein and their attorneys were present as heretofore. Defendants Vincent Bruno, Frank Flier, Salvatore Billeci, Richard Benson, Mike J. Billeci, John Christopher, Samuel Louis Cohen, Stanley Paliwoda, Henry Gourdin, Millard Davis, Paul Crivello, John Ternullo, Harry Fishman, Frank Arriola, Renaldo Ferrari, and Joseph Pitta each entered a plea of "Not Guilty" as to the Indictment filed herein, which said pleas were ordered entered.

Ordered that this case be continued to December 16, 1946, at 2 p.m. to be set for trial and for hearing of motions. [31]

Further ordered that the motions to dismiss and for bill of particulars as to certain defendants be and the same are hereby denied. [32]

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated, San Francisco, California, April 22, 1947.

RENALDO FERRARI,

Defendant,

JAMES MARTIN MacINNIS,

Attorney for Defendant

Renaldo Ferrari.

Approved:

LOUIS E. GOODMAN,

Judge, United States District

Court, Northern District of

California.

[Endorsed]: Filed April 22, 1947. [33]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 22nd day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

ORDER GRANTING MOTIONS FOR
SEVERANCE OF TRIAL

The defendants and their attorneys being present, the cases of these defendants came on regularly this day for trial. After hearing the attorneys herein, the Court advising the parties hereto that the motions for severance of trial had been granted, and James T. Davis, Esq., Assistant United States Attorney, advising the Court that it was the intention of the United States Attorney to proceed with substantive offenses contained in the Indictment and not the conspiracy charge * * *. [34]

District Court of the United States Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 23rd day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO DISMISS
COUNTS NOS. 1, 39 AND 40 OF INDICT-
MENT

The case of United States of America vs. Renaldo Ferrari came on regularly this day for trial before the Court sitting without a jury, the parties hereto having heretofore waived trial by jury in writing. The defendant, Renaldo Ferrari, was present in Court with his attorney, James MacInnis, Esq. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. G. E. Mallory, Thomas E. McGuire, William H. Grady, Henry B. Hays and Elmer A. Briscoe were sworn and testified on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibits Nos. 1 to 7 inclusive. The United States then rested. [35] On motion of Mr. Davis, it is Ordered that all Counts of the Indictment other than Counts One, Thirty-nine and Forty be and the same are hereby dismissed as to defendant Renaldo Ferrari.

Mr. MacInnis made a motion to dismiss Counts One, Thirty-nine and Forty of the Indictment, which motion was ordered denied.

Henry J. Gourdin and Vincent Bruno were sworn and testified on behalf of defendant. Mr. MacInnis introduced in evidence and filed Defendant's Exhibits A-1, A-2, A-3, A-4, A-5, A-6, A-7 and A-8.

The hour of adjournment having arrived, it is ordered that the further trial of this case be continued to April 24, 1947, at 10 o'clock a.m. [36]

District Court of the United States,
Northern District of California,
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 24th day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

MOTIONS IN ARREST OF JUDGMENT AND
FOR NEW TRIAL DENIED; JUDGMENT
OF GUILTY; SENTENCE

The parties hereto being present as heretofore, the further trial of the defendant Renaldo Ferrari as to Counts Nos. One, Thirty-nine and Forty of Indictment was this day resumed. Frank Flier and Renaldo Ferrari were sworn and testified on behalf of the defendant. Mr. MacInnis introduced in evidence and filed Defendant's Exhibits A-9, A-10, A-11, A-12 and B. The defendant thereupon rested. William H. Grady, Henry B. Hays and Thomas E. McGuire were recalled and further testified on behalf of the United States, in [37] rebuttal, and the United States rested. After hearing the attorneys herein, the case was submitted to the Court, and

due consideration having been thereon had, It Is Ordered that the defendant Renaldo Ferrari be, and he is hereby, adjudged Guilty on Counts One, Thirty-Nine and Forty as charged in the Indictment.

Mr. MacInnis made a motion in arrest of judgment and motion for new trial, which motions were ordered denied.

The defendant was then called for judgment. After hearing the defendant and the attorneys, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant Renaldo Ferrari, having been convicted upon his plea of "Not Guilty" and a finding by the Court of Guilty of the offense as charged in Counts One, Thirty-nine and Forty of the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Day and pay a fine to the United States of America in the sum of One (\$1.00) Dollar on Count One of the Indictment; and Three (3) Years and pay a fine in sum of One Hundred (\$100.00) Dollars on each of Counts Thirty-Nine and Forty of the Indictment, making a total fine of Two Hundred and One (\$201.00) Dollars.

It Is Further Ordered that the terms of imprisonment [38] imposed on said defendant in Counts One, Thirty-nine, and Forty commence and run concurrently.

It Is Further Ordered that all remaining Counts contained in the Indictment be, and the same are hereby, dismissed as to defendant Renaldo Ferrari.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to a Federal Penitentiary. [39]

District Court of the United States for the
Northern District of California, Southern
Division

No. 30449-G

UNITED STATES OF AMERICA,

vs.

RENALDO FERRARI.

JUDGMENT AND COMMITMENT

On this 24th day of April, 1947, came the attorney for the government and the defendant appeared in person with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violation of the Jones-Miller Act, 21 U.S.C. Section 174, in that the defendant on or about the 5th, 17th and 28th days of January, 1946, in the City and County of San Francisco, State of California, did fraudulently and knowingly conceal and facilitate the concealment of certain lots of heroin as charged in Cts. 1, 39, and 40 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Day and pay a fine to the United States of America in the sum of One Dollar (\$1.00) on Count One of the Indictment, and Three (3) Years and pay a fine in the sum of One Hundred Dollars (\$100.00) on each of Counts Thirty-Nine and Forty of the Indictment, making a total fine of Two Hundred and One Dollars (\$201.00).

It Is Further Ordered that the terms of imprisonment imposed on said defendant in Counts One, Thirty-Nine, and Forty, commence and run Concurrently.

It Is Further Ordered that all remaining counts contained in the Indictment be and they are dismissed as to the defendant Renaldo Ferrari.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

LOUIS E. GOODMAN,
United States District Judge.

Examined by:

JAMES T. DAVIS,
Asst. U. S. Attorney.

The Court recommends commitment to: Federal Penitentiary.

Entered in Vol. 38 Judg. and Decrees at Page 96.

Filed and entered this 24th day of April, 1947.
C. W. Calbreath, Clerk; L. R. Elkington, Deputy Clerk. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Renaldo Ferrari, defendant herein, hereby appeals to the Circuit Court of Appeals of the United States of America in and for the Ninth Circuit from that certain judgment of conviction made and entered against him upon this day, April 24, 1947, by the above entitled court, Honorable Louis E. Goodman, presiding, the same being judgment en-

tered upon respective findings of guilt returned by said court against said defendant upon counts one, thirty-nine and forty of the indictment bearing the above number and upon which said defendant received, upon the respective counts designated above, the following respective sentences:

Upon said count one—one day's imprisonment and a fine of \$1.00

Upon said count thirty-nine—three years' imprisonment and a \$100.00 fine

Upon said count forty—three years' imprisonment and \$100.00 fine

(All of said sentences and/or impositions to run concurrently)

Said defendant also appeals from all orders and/or judgment of an interim character, or otherwise, heretofore made by the above entitled court in the above entitled cause upon all ruling of said court, upon demurrers heretofore submitted and/or motions to dismiss heretofore made and from all rulings of the above entitled court made during the course of the trial of said defendant.

RENALDO FERRARI,
Defendant.

VINCENT W. HALLINAN,
JAMES MARTIN MacINNIS,
Attorneys for Defendant.

[Endorsed]: Filed April 29, 1947. [41]

At a Stated Term, to-wit, the October Term 1946, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the first day of August, in the year of our Lord one thousand nine hundred and forty-seven.

Present: Honorable Francis A Garrecht,
Senior Judge, Presiding,
Honorable William Healy,
Circuit Judge,
Honorable William E. Orr,
Circuit Judge.

No. 11656

RENALD FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SETTING ASIDE DEFAULT OF APPELLANT, AND EXTENDING TIME TO FILE TRANSCRIPT OF RECORD

Upon consideration of the motion of appellant, and stipulation of Mr. Frank J. Hennessy, United States Attorney, counsel for appellee, and good cause therefor appearing,

It Is Ordered that the default of the appellant in failing to file his record on appeal within the forty days from filing the notice of appeal be, and

the same is hereby set aside and the appellant may have to and including August 18, 1947, within which to file the certified transcript of record on appeal herein. [42]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK
TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 42 pages, numbered from 1 to 42, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America, Plaintiff, vs. Renaldo Ferrari, Defendant, No. 30449-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$15.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of August, A. D. 1947.

[Seal]

C. W. CALBREATH,
/s/ M. E. VAN BUREN,
Deputy Clerk.

In the Southern Division of the United States
District Court in and for the Northern District
of California

Before: Hon. Louis E. Goodman,
Judge.

No. 30,449-G

UNITED STATES OF AMERICA,

vs.

RENALDO FERRARI,

Defendant.

Reporter's Transcript

April 23 and 24, 1947

Appearances:

For the Government: James T. Davis, Esq., As-
sistant United States Attorney.

For the Defendant: James M. MacInnis,
Esq. [1*]

Wednesday, April 23, 1947, 10:00 o'Clock A.M.

The Clerk: United States vs. Ferrari, for trial.

Mr. Davis: Ready.

Mr. MacInnis: Ready.

Mr. Davis: If the Court please, in the case of
United States vs. Ferrari, the Government is pro-
ceeding on Count 1, Count 39 and Count 40. Any
other counts in which the defendant Renaldo Fer-
rari may be mentioned are dismissed.

The Court: Very well.

* Page numbering appearing at top of page of Reporter's certified
Transcript of Record.

Mr. Davis: We are proceeding to trial on Counts 1, 39 and 40. If there are any codefendants listed in those, as to the codefendants, the counts are dismissed.

The Court: Very well.

Mr. MacInnis: I would like to take the liberty of making an opening statement, your Honor, so that the Court may be advised as to the facts which we expect to be developed by the Government's evidence.

In this case we have been constrained to waive a trial by jury with full cognizance of your Honor's attitude in this type of offense. I think that, as your Honor has remarked in various of these cases, it is important that society be protected from persons who enhance their own profit by the narcotic traffic. But it is just as important that an innocent defendant be not enmeshed in the maelstrom [2] of trouble concocted by persons other than himself. We expect to show the Court that the defendant Ferrari has been brought to trial here upon the maxim that a man is known by the company he keeps and not upon any other serious intendment. I think it has been established already by the cases which your Honor has heard, by the various pleas of guilty which have been entered by other persons, that there was something going on in relation to the narcotic traffic at the tavern here in San Francisco known as the Star Dust Bar. I think it is obvious that some persons were selling heroin. I think it is obvious that heroin was concealed in a certain room. And I think it is accepted that there

was an investigation going on, and that various of the agents for the Government had access through a certain peep hole to a certain amount of activities which may have gone on in that room. I will not reiterate what may have been said already concerning the difficulties of observation through that peephole because perhaps it will be developed from another perspective through the evidence in this case. I think the best proof I can offer the Court with respect to the defendant Ferrari, with respect to his innocence in this case, will be the testimony of persons who were actually guilty of the offense with which he stands charged. We anticipate calling as witnesses for the defendant Mr. Vincent Bruno, Mr. Frank Flier and Mr. Salvatore Billeci. Those men have [3] pleaded guilty to either the identical offense or to similar offenses growing out of the same transactions. We cannot apologize for their stature before the Court. We cannot enhance their credibility by any words, but we will offer their testimony to the Court to this end: that Ferrari knew all of these defendants. Ferrari is no angel, your Honor. The evidence will not reveal him as an angel. The evidence from my point of view will reveal him as a man who mingled with these people but who, whether from his experiences in his past life or for some other reason, had nothing to, financially or otherwise, with the transactions which have been narrated in these various cases to the Court. He is not a user of narcotics. He has not made a cent out of these transactions. He was in and out of the Star Dust Bar upon many

occasions, and we will invite the Court to scrutinize carefully the oral admissions which will be offered in evidence as corroborating proof attached to the presence of this man in the back room of the Star Dust Bar. We will offer, your Honor, the suggestion that words and conversations may be equivocal in meaning. We will ask your Honor to give full intent to the section of the Code which says that the oral admissions of a defendant must be viewed with caution. We will ask your Honor to scrutinize carefully whether or not under the decisions the acts which will be attributed to Ferrari constitute in the [4] language of this indictment either concealment or facilitating the concealment of heroin or of any other narcotic, and upon those premises we will be very glad to submit the case to your Honor's consideration.

Mr. Davis: You have no objection, Mr. MacInnis, I presume, to my calling the Government chemist out of order?

Mr. MacInnis: No objection.

G. E. MALLORY

called as a witness on behalf of the Government; and being first duly sworn, testified as follows:

Q. (By the Clerk): Will you state your name to the Court? A. G. E. Mallory.

Direct Examination

By Mr. Davis:

Q. Mr. Mallory, what is your occupation?

A. Chemist, employed by the U. S. Treasury Department, Bureau of Internal Revenue.

(Testimony of G. E. Mallory.)

Q. How long have you been engaged in that occupation? A. 26 years.

Q. In the course of your duties in that position, did you have occasion to perform certain tests upon substances submitted to you by the Bureau of Narcotics to determine the nature of their contents?

A. Yes, sir.

Q. Have you brought with you today certain exhibits which you [5] have examined at the request of the Narcotic Division? A. Yes, sir.

Q. I will show you, Mr. Mallory, a white paper package contained in this brown envelope marked "Laboratory 152304," and ask you if you have ever seen that before? A. Yes, sir.

Q. From whom did you receive that?

A. Narcotic Agent Briscoe.

Q. When did you receive it?

A. On January 8, 1946.

Q. Did you perform the tests which you have described on the contents of that package?

A. Yes, sir.

Q. What did you find that package to contain?

A. It contained heroin hydrochloride.

Q. I will show you this brown envelope marked "Laboratory 152304," and ask you if that is the envelope in which a white paper package was contained when you received it? A. Yes, sir.

Q. Have you retained both of those in your possession until brought here to court today?

A. Yes, sir.

(Testimony of G. E. Mallory.)

Mr. Davis: If the Court please, I will ask that this white paper package identified by the witness be marked as Government's Exhibit first in order for purposes of [6] identification; the brown paper envelope marked "Laboratory No. 152304," I ask to be marked as Government's Exhibit No. 2 for purposes of identification.

The Court: Very well.

(The package and envelope referred to were thereupon marked, respectively, U. S. Exhibits 1 and 2 for Identification.)

Q. (By Mr. Davis): I will show you, Mr. Mallory, a white paper package and ask you if you have ever seen that before? A. Yes, sir.

Q. When did you first see that?

A. January 21, 1946.

Q. And from whom did you receive that?

A. Narcotic Agent Briscoe.

Q. Did you perform the tests which you have described upon the contents of that package?

A. Yes, sir.

Q. And what did you find it to contain?

A. Heroin hydrachloride.

(At this point in the testimony the Jury in the case of U. S. vs. Pitta returned its verdict and the defendant in that case was sentenced.)

Q. (By Mr. Davis): I will show you this envelope marked "Laboratory 152574," and ask you if that is the envelope which contained this package, this white package which is [7] dated January 17, 1946? A. Yes, sir.

(Testimony of G. E. Mallory.)

Q. Have both of these been in your possession since they were delivered to you until they were produced in court today? A. Yes, sir.

Mr. Davis: At this time, if the Court please, I offer in evidence as Government's Exhibit first in order the white paper package identified by the witness and the brown envelope numbered 152574.

The Court: Did the witness state from whom he received those?

Mr. Davis: Yes, I believe so.

The Witness: Narcotic Agent Briscoe.

(The envelopé and package in question were thereupon marked, respectively, U. S. Exhibits 3 and 4, for Identification.)

Q. (By Mr. Davis): I will show you this white paper package and ask you if you have seen that before? A. Yes, sir.

Q. From whom did you receive that?

A. I received this from two narcotics agents, Narcotics Agent Hayes and Narcotics Agent Briscoe on the 29th of January, 1946.

Q. Did you perform the tests which you have described upon [8] the contents of that package?

A. Yes, sir.

Q. What did you find it to contain?

A. Heroin hydrochloride.

Q. I will show you this envelope marked "Laboratory 157378," and ask you if that is the envelope in which this white package which you have described was contained? A. It is, yes, sir.

(Testimony of G. E. Mallory.)

Q. Have both of these been in your possession until they were produced in court today?

A. Yes, sir.

Mr. Davis: If the Court please, at this time I will introduce as Government's Exhibit next in order for purposes of identification this white paper package identified by the witness, and as Government's Exhibit next in order this envelope marked "Laboratory 152378."

(The envelope and package referred to were thereupon marked respectively U. S. Exhibits 5 and 6 for Identification.)

Mr. Davis: That is all.

Mr. MacInnis: No questions.

The Court: Do you wish Mr. Mallory any further?

Mr. MacInnis: I do not. [9]

THOMAS E. McGUIRE

called as a witness on behalf of the Government; and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. Thomas E. McGuire.

Direct Examination

By Mr. Davis:

Q. Mr. McGuire, what is your occupation, please? A. Federal Narcotics Agent.

Q. How long have you been engaged in that occupation? A. Approximately twenty years.

(Testimony of Thomas E. McGuire.)

Q. Directing your particular attention to the months of January and February, 1946, were you among other agents conducting an investigation of the premises known as the Star Dust Bar on Sutter Street?

A. Yes, sir, I was.

Q. During that time did you have a room which was adjacent to the liquor store room of the Star Dust Bar from which you could see into the premises of the Star Dust Bar?

A. Yes, sir, I did.

Mr. Davis: May I withdraw the exhibit introduced in the previous case, your Honor, for purposes of this case?

The Court: Very well.

Q. (By Mr. Davis): I will ask you to examine this diagram, Mr. McGuire, which purports to be a diagram of the basement [10] of the premises of the Star Dust Bar, and ask you if after your examination that, to the best of your recollection at this time is a true and accurate portrayal of the physical characteristics of the rooms at that time?

A. Yes, sir, it is.

Mr. Davis: If the Court please, I will offer this as Government's Exhibit next in order for purposes of identification.

(The diagram in question was thereupon marked U. S. Exhibit No. 7 for Identification.)

Q. (By Mr. Davis): Mr. McGuire, in the interest of saving time will you briefly and to the best of your ability describe the situation as to these rooms?

(Testimony of Thomas E. McGuire.)

A. In the rear of the Star Dust Bar in this basement; that is the basement of the apartment house that is located on Larkin Street, the northeast corner of Larkin and Sutter Streets. The basement consists of a large baggage room that is used for the storage of baggage and the household furnishings of the apartment house. That had a heavy door on it and locked from the outside. It had four windows within that facing the alley way in the rear of the building with an exit on Larkin Street. In the basement with this baggage room was the liquor store room or a smaller room that was occupied and used as a liquor store room that belonged to the Star Dust Bar. There was a large hall way [11] and there was a men's toilet and an elevator shaft and an exit leading out into a light well, and then the entrance leading into the rear of the Star Dust Bar.

Q. Were there, or were there not certain holes in the wall separating the baggage room and the hall way and the liquor room?

A. Yes, sir, there was.

Q. Will you describe them for us?

A. At the door of the baggage room we had two holes placed therein into the wall beside the door. Those two holes gave an observation of the public hall, the entrance to the bar, and through those two holes you were able to see the people coming from the bar and going into the liquor room. Those two were in heavy brick wall, and we had those holes placed. One was three feet from the ground or thereabouts, and the other was higher, about five

(Testimony of Thomas E. McGuire.)

feet from the ground. They looked out from the baggage room to the hallways leading into the liquor room and the bar of the Star Dust. There were four other holes that were in the partition between the baggage room and the liquor room. You could not see the public hall from those four holes. You could only see the inside of the liquor supply room, and that could be seen from the baggage room.

Q. Approximately how large were those holes?

A. I would judge they ran from three-and-a-half to four [12] inches to about eight inches. They were irregular and they were cut out previously by some other people other than ourselves.

Q. About how high were they from the floor?

A. I would judge they were three-and-a-half or four feet from the floor. That was the holes that led between the baggage room and the liquor room.

Q. In the wall of the liquor room right opposite these holes was there anything on that wall?

A. We could see numerous bottles of assorted whiskeys, wines and cordials that were on shelves.

Q. You say there were shelves on that wall?

A. Yes, sir.

Q. What was the position of any of the shelves to the particular holes, if you can describe that?

A. You could see the tops of the liquor bottles, but it did not obscure the entire view from the inside of the liquor room.

Q. Can you, from your recollection, describe more accurately the position of these four holes in relation to any particular shelf that was in there?

(Testimony of Thomas E. McGuire.)

A. Well, if I am judging—looking at it from the baggage room into the liquor room you could see that there was a shelf below the hole, and you could not see, of course, even in this wall, on this side, the same side as the holes [13] were in, but on the opposite side you could see that there were different shelves on the opposite side of the wall.

Q. In relation to the hole as you looked through it, could you see a shelf on your side of the wall, that is, the side of the wall nearest to the hole?

A. Yes, sir, I would say that you could possibly see the edge of the shelf sticking out from the wall, but not enough—and you could see bottles on it.

Q. Was the shelf above or below the hole, or in the middle of it?

A. I believe it was below it.

Q. The shelf was below the hole?

A. Below it, because I could see the tops of whiskey bottles.

Q. Directing your attention to the fifth day of January, 1946, did you have occasion to see the defendant, Mr. Ferrari, on that day? A. I did.

Q. When did you first see him, and where?

A. On January 5 about eight-thirty in the evening—1946, this is—I seen the defendant Ferrari under this liquor store room where Yorkie Flier had previously entered. In other words, Yorkie Flier had entered the liquor room for about two or three moments, or a minute or two, before the defendant, and I saw the defendant enter into the liquor room. [14]

(Testimony of Thomas E. McGuire.)

Q. Where were you at the time you saw the defendant and Flier enter in relation to the particular holes?

A. I was at one of the holes observing Flier as the defendant Ferrari entered.

Q. I mean, which holes? The holes that looked into the hallway or the holes which looked into the liquor room?

A. No, sir, at the time the Defendant Ferrari entered the liquor room I was observing the holes entering into the liquor room.

Q. So that you did not see him coming down the hall? A. No, sir, I did not.

Q. What, if anything, did you observe after the defendant Ferrari entered the liquor room?

A. The defendant Ferrari came into the liquor room, and the man known to me as Flier handed to the defendant Ferrari a bindle, a small piece of paper. The defendant took a penknife and extracted some of the white substance from this bindle, placed it to his nostrils, and with deep inhalations withdrew the white substance into his nostrils, both nostrils on two occasions, first in one and then the other. After doing so—at first, I had observed the defendant Flier do the same thing prior to giving it to Ferrari. Ferrari did as Flier had done, took those deep inhalations of the white substance, and then handed back the paper to Flier and the knife, and Flier then got ready to leave the premises [15] after refolding the paper. Shall I continue?

Q. Before you go on any further as to Flier, this

(Testimony of Thomas E. McGuire.)

bindle you say you saw Flier give to the defendant, had you ever seen that bindle before?

A. Well, not until I seen it in Flier's hands, no, sir, that was the first evening that we were in there.

Q. What happened after that transaction? Did they leave?

A. They opened the liquor storeroom, and as they did so I noticed the defendant Flier hide the bindle in which I had seen the white substance extracted in between three or four beer cases. That was the first time I had seen that place of concealment, on January 5, and I observed the place of concealment from the vantage point of the baggage room in looking through the openings into the liquor room to the door as they were leaving. I was observing what had happened to the bindle. I saw the defendant Flier place the bindle in the place of concealment on this particular occasion from the inside of the liquor room, through the liquor room, if I make myself clear. The door was partly open as he was placing it there.

Q. Did you see that bindle again on that evening?

A. Yes, sir, about ten o'clock at night at a favorable opportunity to myself and Agent Grady, I left the place of concealment, went to the place of concealment where the narcotic was hidden, or at least the bindle was hidden at that time, [16] took it into the baggage room. I withdrew some of the white substance and refolded the paper and placed it back in the place of concealment again, and I retained

(Testimony of Thomas E. McGuire.)

the white substance in my possession until such time as I turned it over the Agent Briscoe, who forwarded it to the chemist.

Q. That was about ten o'clock?

A. I extracted the sample of evidence from the envelope about ten o'clock, 10:10.

Q. About what time was it that Ferrari and Flier used it?

A. I would judge it was about eight-thirty.

Q. Did you have the hiding place of that bundle under your observation in the interim?

A. Yes, sir, I did. I had remained there and watched it.

Q. Did you see anyone else approach and touch that bundle in any way?

A. I do not recall that they did at that time. They did later.

Q. Between the time that you saw the defendant and Flier use it and the time that you took the sample, do you know whether anyone else disturbed the bundle?

A. No, sir, to the best of my knowledge and recollection I can't recall that it had been disturbed at that particular instant that night, but later, after I had extracted it, it had been disturbed.

Q. I will show you Government's Exhibit No. 1 and ask you if this is the bundle in which you placed the contents, the [17] sample which you removed from the bundle which you described?

A. Yes, sir, it is.

(Testimony of Thomas E. McGuire.)

Q. Did you place your initials on it at this time?

A. My initials are on that package.

Q. And you recognize them there now?

A. Yes, sir.

Q. Did the defendant and Flier have any conversation while they were in the room?

A. There was very little conversation at that time. They just came in and remained there a very short while and then left.

Q. Directing your attention, Mr. McGuire, to the 17th day of January, 1946, were you in this room in the Star Dust Bar again?

A. Yes, sir, I was.

Q. What time did you first arrive there?

A. I had been there in the afternoon, earlier in the afternoon and in the evening. I had been there other than the time I took to have my dinner at six or seven o'clock, depending on which of the other agents had relieved me.

Q. Did you see the defendant Ferrari on that occasion? A. Yes, sir, I did.

Q. At what time was that?

A. That was about eleven-thirty at night I seen the defendant enter that same liquor store from the place of concealment [18] which I had in the baggage room.

Q. Who, if anyone else, was with him?

A. He was with Flier again.

Q. What did you observe on that occasion?

A. I observed the defendant on that occasion take a bindle of heroin from the place of conceal-

(Testimony of Thomas E. McGuire.)

ment. The defendant Ferrari used it in the same manner in which he had on the first occasion, by taking deep inhalations of the white substance from a knife blade, after which the paper—the white substance was enclosed back into the paper in the original form, handed to Flier, and Flier again concealed it in the same place of concealment between the whiskey bottles.

Q. You say you were in the baggage room looking out and you saw Flier remove the bindle in the second instance as in the first, is that correct?

A. Well, I did not see him remove it in the first instance, because it was the first occasion we had been there and I had no knowledge of the place of concealment of the narcotic. But that was the first indication that I had that they were concealing these narcotics under the beer cases, and I did not see them until after they were leaving the liquor store. That was on the first occasion. But on the second occasion I was able, knowing that the narcotics were concealed between these beer bottle boxes, I had that under observation at the time Flier and Ferrari came to the liquor store and prior to [19] their entering into the liquor room Flier withdrew the narcotic from the place of concealment upon entering the liquor room.

Q. Had you ever seen that bindle which was withdrawn before? A. Yes, sir, I had.

Q. When had you seen that?

A. At ten o'clock that evening, having had the bindle under observation on previous occasions when

(Testimony of Thomas E. McGuire.)

other men were in the liquor store, and at a favorable time to myself and the other agents I again stepped out of the place of concealment, and it was, I should judge, eleven o'clock that I did that; I took the substance—I took the package back into the baggage room, removed some of the contents, and replaced the bundle back in the place of concealment.

Q. I will show you Government's Exhibit No. 3 and ask you if this is the package in which you placed the sample which you took on the second occasion from the bundle which was concealed between the beer cases?

A. Yes, sir, it is. My initials are now on this package which I placed at that time.

Q. At what time, approximately, did you take the sample?

A. I would say it was approximately eleven o'clock.

Q. At what time did the defendant Ferrari and Flier use it?

A. I would say it was eleven-thirty.

Q. Between eleven o'clock and eleven-thirty, did you see [20] anyone else interfere with that bundle?

A. No, sir, I did not.

Q. Did you have it under your observation during that whole half-hour? A. I did.

Q. Did the defendant and Flier have any conversation at that time?

A. They spoke—on the 17th of the month I am speaking of—but I am not in a position to state

(Testimony of Thomas E. McGuire.)

what they said. They spoke in a lower tone than usual. I couldn't swear to what they did say on that occasion.

Q. Going on to the 28th day of January, Mr. McGuire, were you at the Star Dust on that day?

A. No, sir, not on that day, I was not.

Mr. Davis: I believe that is all of this witness.

Mr. MacInnis: No questions.

The Court: That is all. I think we will take a recess.

(Recess.)

WILLIAM H. GRADY

called as a witness on behalf of the Government; and being first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. William H. Grady. [21]

Direct Examination

By Mr. Davis:

Q. Mr. Grady, what is your occupation?

A. Agent of the Federal Bureau of Narcotics.

Q. Directing your attention to the months of January and February of 1946, were you one of the agents engaged in making observations and investigations in the premises known as the Star Dust Bar on Sutter Street? A. I was.

Q. Directing your particular attention to the fifth day of January of that year, were you in the baggage room of the Star Dust Bar?

A. Yes, sir.

(Testimony of William H. Grady.)

Q. At what time did you enter?

A. Approximately between eight and eight-thirty p.m.

Q. Did you have an occasion to see the defendant on that day? A. Yes, sir.

Q. At what time did you first see him?

A. Approximately eight thirty-five I saw Frank Flier followed by the defendant Renaldo Ferrari leave the Star Dust Bar, the rear door, and walk to the door and enter the liquor room.

Q. Where were you? From what position were you observing that?

A. To the best of my recollection it was Position No. 1, Observation Position No. 1 on the map.

Q. That was the section of the wall that looked out into the [22] hall way?

A. Into the hall way, yes, sir.

Q. What, if anything, did you observe as the defendant entered the hall way and approached the door of the liquor room?

A. I observed Flier first open the door and first observed a movement of the stack of beer cases. Then Flier entered the room and closed the door, and shortly thereafter Ferrari came up and rapped on the door. Flier opened the door and then Ferrari entered.

Q. Did you observe anything which transpired on the inside of the liquor room?

A. Yes, sir.

Q. From what position were you observing that?

A. The different observation positions listed on the map as 3, 4, 5 and 6.

(Testimony of William H. Grady.)

Q. What, if anything, did you observe?

A. I observed the defendant with Flier in the liquor room. I saw Flier standing with a package open in his hand with a pearl-handled knife, a small blade, and I observed him hand this package and the knife to the defendant Ferrari, and I saw the defendant Ferrari place a small quantity of the powder from the paper package on the end of the knife and hold it up to his nostrils and inhale or draw the *power* into his nostrils.

Q. What, if anything, did you observe next?

A. I then observed Flier and the defendant Ferrari go to leave the liquor room. I then changed position and went back to Position No. 1, Observation Position No. 1 on the map, and I saw Ferrari walk into the hall way, and Flier a few seconds later closed the door and joined Ferrari, and they walked together into the bar.

Q. Did you ever see the bindle again which you had seen in the room on that evening?

A. Yes, sir.

Q. When did you next see that?

A. I saw that at approximately 10:10 p.m., when Agent McGuire—I held the door of the baggage room open. Agent McGuire went out and removed the bindle and brought it into the baggage room, and we took a portion of the powder that was on the inside of the bindle.

Q. Did you see Agent McGuire remove the bindle?

A. To my recollection I would say that I did. To the best of my recollection I would say that I did.

(Testimony of William H. Grady.)

Q. I will show you Government's Exhibit No. 1 For Identification. Is that the package into which Agent McGuire or you put the contents of the sample you had taken from the bindle?

A. Yes, sir. This is identified with my initials.

Q. Now, directing your attention to the 17th day of January, were you in the Star Dust Bar on that occasion?

A. Yes, sir. [24]

Q. Did you see the defendant there at that date?

A. Yes, sir.

Q. When did you first see him?

A. About eleven thirty-five p.m.

Q. At first time had you first entered the store-room previous to that?

A. Previous to that? To the best of my recollection, at approximately seven p.m.

Q. What did you observe at 11:35 when you saw the defendant?

A. I observed the defendant, Flier and Ferrari—I observed the defendant Ferrari and Flier enter the liquor room. Flier entered the room first and to my recollection—I was watching through the observation post, on the inside looking into the liquor room, and as the door opened I see Flier reach down and remove the bindle between the—from the hiding place between the third and fourth beer case, and come inside the door with Ferrari right behind him. Flier closed the door. It has a Yale lock, a spring lock. It was closed and locked. Flier first used from the bindle in the manner which I have previously described, using a small silver-bladed

(Testimony of William H. Grady.)

knife, with which he inhaled some of the powder from the package. Ferrari then used the powder in the same manner. The package was wrapped, put back—folded back in the same position—and as they left, Flier returned the package to the hiding place. [25]

Q. This bindle that you saw them use, when did you first see that package that evening?

A. Approximately a half-hour before—around eleven—between 10:40 and 11 p.m.

Q. And under what circumstances did you see that?

A. At that time Agent McGuire removed the bindle from between the third and fourth beer cases, from the hiding place, brought it into the baggage room, and we removed a sample of the bindle at that time and retained a sample for ourselves, re-folded the bindle and put it back between the third and fourth beer cases.

Q. Between ten o'clock and ten-thirty when you saw the defendant use that bindle, did you have the bindle under your observation or the hiding place? A. Yes, yes, I had.

Q. Did you see anyone else interfere or move the bindle? A. No, sir.

Q. I will show you Government's Exhibit 3 for Identification and ask you if that is the package into which you or Agent McGuire in your presence placed the sample which you had taken from the bindle? A. Yes, sir.

(Testimony of William H. Grady.)

Q. Now, directing your attention to the 28th day of January of that year, were you in the Star Dust Bar baggage room on that occasion? [26]

A. Yes, sir.

Q. Did you see the defendant on that occasion?

A. Yes, sir.

Q. What time did you see him?

A. At 5:05 p.m. on the 28th the defendant Ferrari, together with Bruno and Flier entered the liquor room of the Star Dust Bar. Flier came first, and as he opened the door I was making my observations from the places on the inside of a liquor room. I saw Flier remove the bindle from the hiding place, the beer cases. Flier walked into the liquor room, followed by Ferrari and Bruno. Flier then opened the package that he had taken from the beer case, and using a small knife, sniffed part of the contents, and then handed the package to Bruno and Ferrari, and they in turn sniffed some of the contents of the package. Flier then refolded the package and placed the narcotics back in the hiding place.

Q. Had you seen the bindle which they used in the room on that occasion which you described any other time during that evening? A. Yes, sir.

Q. At what time? A. At 8:50 p.m.

Q. Under what circumstances did you see it at that time?

A. At that time with Agent Hays. Agent Hays held the door as I went to the beer cases and re-

(Testimony of William H. Grady.)

moved the bundle from the [27] hiding place and took a sample therefrom and returned the bundle back to the hiding place.

Q. I will show you Government's Exhibit No. 5 for Identification and ask you if this is the package into which you placed the sample taken from the bundle at the time you described?

A. Yes, sir.

Q. Do you see your initials?

A. That is my initials.

Q. When were they placed on there?

A. At the time this package was made up.

Q. To whom did you give this package?

A. I delivered that package to Agent Briscoe.

Q. What time did you take the sample?

A. At 8:50.

Q. What time did you say they had used the bundle in the room? A. 5:05.

Q. From 5:05 to 8:50 did you have that hiding place under observation? A. Yes, sir.

Q. Did you see anyone else interfere with the bundle? A. No, sir.

Q. By the way, Mr. Grady, during this investigation approximately how many agents worked on it?

A. There was approximately eight—as a guess I would say [28] eight agents. It might have been six or ten, but there were approximately eight.

Mr. Davis: I believe that is all.

Mr. MacInnis: No questions.

The Court: That is all.

HENRY B. HAYS

called as a witness on behalf of the Government; and being first duly sworn, testified as follows:

Q. (By the Clerk): State your name.

A. Henry B. Hays.

Direct Examination

By Mr. Davis:

Q. Mr. Hays, what is your occupation, please?

A. Narcotics Agent.

Q. How long have you been engaged in that occupation?

A. I have been with the Bureau of Narcotics since 1936. Prior to that I was with the Bureau of Internal Revenue Department.

Q. Mr. Hays, were you one of the agents who conducted the investigation in the Star Dust Bar?

A. I am.

Q. Directing your particular attention to the 17th day of January, 1946, did you have occasion to be in the baggage store room in the basement of the Star Dust Bar? [29]

A. Yes, sir.

Q. Did you observe the defendant on that occasion?

A. I did.

Q. At what time did you observe him?

A. I was present with Agents McGuire, Grady and Briscoe. At approximately 11:35 p.m. the defendant and Frank Flier came out of the bar room and entered the liquor store room, and as Flier opened the door he stooped down to run his hand under a stack of beer cases which were stacked

(Testimony of Henry B. Hays.)

along the hall way next to the door, and he removed something. I couldn't see his hand. I could see part of his body, his elbows or arms go under the beer cases. The beer cases at that time—there was about six or seven which was stacked up a little higher than the door. I could see the top of them move. And then I went to the opening and looked into the liquor store room and I saw Frank Flier with a package, a small knife, sniffing some white powder which he removed with the blade of the knife—sniffed it, and passed the package to the defendant, who used it in the same manner with the knife and sniffed it up his nose. And then they left, and as they left I went outside and I saw Flier do the same thing before he closed the door and go under the empty beer cartons, moved and placed something there.

Mr. Davis: I believe that is all of this witness.

Mr. MacInnis: No questions.

The Court: That is all. [30]

ELMER A. BRISCOE

called as a witness on behalf of the Government; and being first duly sworn, testified as follows:

Q. (By the Clerk): State your name to the Court. A. Elmer A. Briscoe.

Direct Examination

By Mr. Davis:

Q. Mr. Briscoe, during the months of January and February, 1946, what was your occupation?

(Testimony of Elmer A. Briscoe).

A. I was an Agent for the U. S. Bureau of Narcotics.

Q. Directing your particular attention to the fifth day of January of that year, did you have an occasion to be in the baggage room in the basement of the Star Dust Bar?

A. No, I did not, not on that day.

Q. Not on the fifth? A. No, sir.

Q. Directing your attention, then, to the seventeenth day of January of that year, did you have an occasion to be there at that time?

A. Yes, I was in the room at that time.

Q. I will show you Government's Exhibit No. 3 for Identification, and ask you——

The Court: Wasn't he concerned with both of them?

Mr. Davis: Yes.

The Court: Why don't you do it all at one time, unless there is some objection? [31]

Mr. MacInnis: No objection.

Mr. Davis: Exhibit 1 I believe he received at a different time.

Q. I will show you Government's Exhibit 1.

Mr. MacInnis: I would be willing to accept a stipulation as to what this witness will state, Mr. Davis.

Mr. Davis: My only purpose in introducing Mr. Briscoe's testimony is to show that on all three of these occasions I believe he received these exhibits, 1, 3 and 5, and that he kept them in his custody until he delivered them to the chemist.

(Testimony of Elmer A. Briscoe).

Mr. MacInnis: That is all right. He stated he was not present on January 5.

Mr. Davis: No, but I can establish that he got this from Agent McGuire on the same day at some different place.

Mr. MacInnis: I will stipulate that he would testify to that.

The Court: McGuire has already testified that he delivered this to Agent Briscoe. I do not recall what he said when he did that.

Mr. MacInnis: That is correct.

Mr. Davis: The stipulation will be if this witness testified he would testify as to Exhibits 1, 3 and 5 for Identification, that as to Exhibits 1 and 2, he received them from Agent McGuire. [32]

The Witness: That is correct.

The Court: Exhibits 1 and 3.

Mr. Davis: 1 and 3, from Agent McGuire; Exhibit 1 on the fifth, Exhibit 3 on the seventeenth.

Q. Is that correct?

A. Yes, that is correct, Mr. Davis.

Mr. Davis: And that he kept those in his custody until he delivered them to the Government chemist, and as to Exhibit No. 5, that he received that from Agent Grady on the 28th.

The Witness: That is correct.

Mr. Davis: And kept it in his custody until he delivered it to the chemist. That is all.

The Court: Is that acceptable?

Mr. Davis: Yes. If the Court please, at this time the Government will move that the exhibits

(Testimony of Elmer A. Briscoe).
previously offered for identification be accepted in evidence, and the Government will rest.

Mr. MacInnis: No objection.

The Court: Very well, they may be admitted.

(U. S. Exhibits 1 to 6, inclusive for identification were thereupon received in evidence.)

Government rests.

Mr. MacInnis: I have one or two motions, your Honor.

The Court: Very well. [33]

Mr. MacInnis: We move, at the outset, that the Court make its order quashing and dismissing the first count of the indictment in this case against the defendant Ferrari upon the ground of a fatal insufficiency between the allegations in that count and the proof as offered here, the Government having submitted its evidence and having rested.

The Court: What is the basis of that motion?

Mr. MacInnis: I thought it was rather obvious, but perhaps it is not. The count charges that upon a certain day, the 5th day of January, which has been alleged with definiteness by the witness and included in the question of the prosecutor, that Vincent Bruno and Renaldo Ferrari committed the overt act set forth in that first count. The evidence failed to mention Vincent Bruno. The evidence is, according to the testimony of Mr. McGuire, that Frank Flier and this defendant committed a certain described act upon that date. It would be difficult for me to conceive how a defendant or his attorney could prepare the defense of a case if a variation

of that sort be not deemed a fatal insufficiency or a fatal variance between the pleading and the proof. It is two different people. One could not possibly establish a defense if the Government is permitted to allege that the defendant and A committed an offense upon a particular defendant, and to substantiate that by proof at the time of trial that it was not the defendant and A but the defendant and B. The defendant would be entirely [34] at a loss. It seems to me the implications in that variance can so clearly be seen by the court; not much argument is required. Your Honor can see just what would happen if one attempted to defend a case of that kind. Your Honor can see, of course, these defendants have been charged together, all fourteen or fifteen of them, but that is hardly an answer.

The Court: Suppose the evidence showed this defendant admitted this offense, itself, although he is charged with something else; as long as it shows he participated in it, is anything else material?

Mr. MacInnis: That is like saying that a man could be indicted for robbing one place with someone and be prosecuted upon evidence that he committed a robbery in another city.

The Court: That, of course, would be a variance: There is no question about that. What have you to say about that, Mr. Davis?

Mr. Davis: I believe, your Honor, that inasmuch as we are not proceeding against the defendant Vincent Bruno in this case, who was dismissed from

it, I do not believe it is a fatal variance, as long as we charge the defendant committed the offense with some person on that day and then we prove that he did.

The Court: In other words, you would charge the defendant with having committed the offense on that day, alone.

Mr. Davis: We could have left Vincent Bruno, Flier, or [35] anyone out of the count entirely and merely charge Flier with committing the offense.

Mr. MacInnis: Here are the deeper implications, your Honor, as they would appear to me, although, of course, I am a biased observer. These matters are started in much the same fashion, I suppose. An investigation is had. Agents testify before the Federal grand jury. The grand jury receives evidence, returns a true bill, and the United States Attorney is taken into consultation. There are sworn statements made before the grand jury; indictments are framed in language known to judges and lawyers. Now, obviously some person took the stand before the grand jury and said that on January 5, 1946, Vincent Bruno and Renaldo Ferrari committed a certain crime. That was accepted by the grand jury, accepted by the United States Attorney, and the formal pleading charging the defendants contained that language. The only document to which he could look in order to prepare his defense was that pleading. Various attorneys, including myself, in the long course of the preparation of this trial, made motions for bills of particulars. Upon legal rulings, of course, those motions

were denied. The only way one could prepare a case charging Bruno and Ferrari did a certain thing on a certain date would be this way: "Ferrari, did you do this?"

If he said "No," he would go to Bruno and say, "Did you and Ferrari do this?" If Bruno said "No," you would think [36] that would be your defense, but you come into court and you find the United States Attorney and the Government agents say nothing about Mr. Bruno but have the offense committed with an entirely different man, Mr. Flier. I think it is no answer for the court or for the United States Attorney to say, "We have dismissed Bruno and we are proceeding against Ferrari alone." We obviously cannot prevent the counsel or the court from dismissing the particular case. It is none of our business whether the court dismissed another defendant, but it is no answer to say that, "We could have proceeded against him alone." Of course, they could have, but the information given to this defendant to prepare his case, which I think certainly goes to the heart of the problem on this count, was information to say that he committed an act with Bruno.

The Court: I do not think there is any merit in this. I will deny the motion without prejudice. If after I have heard all the evidence, if there is to be more evidence, in case I come to a different conclusion I can always change my mind.

Mr. MacInnis: The other point I will try to make as briefly and as informally as I can, because I will assume, even though I did not sit through

the entire course of the trial which took place yesterday and today, United States vs. Pitta, I have some information as to the rulings of the court. The second motion is for a dismissal of all [37] of the charges upon the ground that the corpus delicti has not been proved. I made a statement at the outset inviting the court to scrutinize carefully the language of the charge as compared to the evidence offered in support of it. The charge in each instance is identical. The charge is that on certain respective dates Ferrari and others either concealed—I think the technical language in each instance is, “concealed and facilitated the concealment of” certain described bindles of heroin. He is not charged under any section of our law but the Jones-Miller Act, as embodied in United States Code Section 174. He is not charged with any other act under the Jones-Miller Act, except concealing and facilitating the concealment of. It is my understanding, I think—I may not be entirely correct—that your Honor has taken the position, which is indeed endorsed by the statute, itself, that possession of a forbidden or contraband narcotic raises a presumption which is sufficient to prove the case unless repelled by testimony given by the defendant. That is true where possession is the overt act which is charged. In this case I cannot see where there is any evidence accepting as true every utterance of the agents that there was any possession of the prohibited narcotic upon the part of the defendant Ferrari.

The Court: The statute does not say anything about possession. [38]

Mr. MacInnis: It seems to me the statute has the presumption, at the end of the statement of the law.

The Court: The second part of the statute says proof of possession in the trial is sufficient to establish violation of the statute unless the possession is satisfactorily explained. But the statute, itself, that part of it that describes the acts that are contrary to law, speaks of importation and receipt, conceals, buys, sells or in any manner facilitates the receipt or sale.

Mr. MacInnis: I probably express myself poorly there, your Honor. Here is what I want to say: I have made a serious attempt to read the cases discussing the factors of concealment and facilitating the concealment of. It may well be your Honor's reading of the same cases is deeper than mine, because you encounter these cases more often. There is a 1940 case called *King vs. United States*, reported in Volume 41 Fed. (2d), I think it is at page 751. That case is typical of the cases affirming the judgments of conviction for the crime charged here, that is, concealing and facilitating the concealment of. It arose in this circuit, the Ninth, and involved an appeal from a decision rendered in the court of Hon. A. F. St. Sure. The facts in that case were these, and they seem by inference to support the proposition that in order to sustain a conviction under this precise section there must be an overt act which falls into the common sense definition [39] of concealing or facilitating the concealment of.

The defendant in that case was a Canadian Express Company employee. There was a ring of persons dealing in narcotics. This defendant was observed by agents. He had access to the corral of the United States Customs House here, was in and out. He had stolen a sticker from the customs authority and he surreptitiously placed the label on a trunk. The only import of that act is that had it gone unnoticed, this trunk would have gone to the customs officials without any further investigation. The act did not bear further explanation. The trunk was opened and it was found to be filled with opium.

(Further discussion of the case in question.)

The Court: The testimony shows here he had it in his hand, put it on a knife, and sniffed it.

Mr. MacInnis: Yes.

The Court: Isn't that possession from a common sense viewpoint?

Mr. MacInnis: Your Honor and I apparently do not agree on that. But going further than that, you transpose possession and you say not only was the unlawful use of this drug possession, but it constituted concealing and facilitating the concealment of. Your Honor will note in the testimony it was not in any instance Ferrari who was said to have taken the bindle from its hidden position. He is not said to have observed that transaction. He is not said to be the one who [40] replaced the bindle in its hidden position.

The Court: I appreciate all of that, Mr. MacInnis, but at that time, acting according to the

testimony in complete concert with the other two men whose names have been mentioned, or the three men whose names have been mentioned, he participated with them, though he did not physically put his hands on the bundle, to remove the bundle from its place of concealment, or to replace it. Each of the three men used the opium after it was removed from its place of concealment, and he was there along with them. It was replaced in a place of concealment. I do not think it takes any great stretch of the imagination to hold that under any common sense viewpoint the defendant, according to the state of the record, was a participant in both concealment and facilitating the concealment, and also was in possession. I do not see what stronger kind of evidence one would need.

Mr. MacInnis: I won't prolong the argument.

The Court: I understand the point, but I certainly could not hold the evidence is lacking, I mean sufficient evidence as against a motion for judgment is not present.

Mr. MacInnis: How far does your Honor conceive this statute should be applicable? If a man known to be a user or a person having actual possession upon himself of a narcotic, comes up to another and offers it to him, is the offeree or the other person guilty of a crime, if we go no further?

The Court: If you will read the proceedings in connection with the Jones-Miller Act, you will find there why the second part of section 174 was put into the act. The difficulty in detection and enforcement is so great, Congress indicated, this most unusual provision was put into the section: If you

show possession that is sufficient evidence to show a violation of the statute, unless there is a showing to the satisfaction of the jury on the trial of the case, satisfactory explanation as to that possession. In other words, a man might possibly have had possession of the narcotic innocently. It is possible. There are conceivable circumstances under which that might well happen. The burden, however, is put upon anyone who is in possession of a narcotic drug to explain the possession. That is the philosophy behind it, and therefore it does not require the niceties of proof that are required for a violation of other statutes. That is why I would say that it is not necessary for a court to scrutinize the technical nicety as long as possession is shown, in the case of proof under this statute, as it might be under any of the other criminal statutes. You asked me to more or less state my view in the particular instance you mentioned. That is the way I feel about it. I have never read any decisions to the contrary, but if some higher court wants to construe that statute more narrowly, some other judge might do that. But that is my view. I will deny the motion. [42]

Mr. MacInnis: How long does your Honor wish to continue?

The Court: I think we will run along a while.

Mr. MacInnis: Anything your Honor says.

The Court: I have another one of these cases set for tomorrow. We will run along until five, if you think we could finish by then.

Mr. MacInnis: Call Mr. Henry Gourdine, please. .

HENRY J. GOURDINE

called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

By Mr. MacInnis:

Q. Mr. Gourdine, you know the defendant, Renaldo Ferrari, do you? A. Yes, sir.

Q. In the month of January, 1946, which is the month with which the court is concerned in the charges against Mr. Ferrari, can you tell us generally where you were?

A. Just at Los Angeles, California.

Q. About what date did you go to Los Angeles?

A. Toward the middle of December.

Q. Of 1945? A. Yes, 1945.

Q. You were in Los Angeles from December, 1945, up to about what time? [43]

A. Oh, possibly up to the 10th to the 15th of February.

The Court: Isn't this witness a defendant?

Mr. Davis: Yes, your Honor.

The Court: In a case pending here?

Mr. MacInnis: Yes, your Honor.

The Court: His attorney is not here? Are you his attorney?

Mr. MacInnis: No, I am not, your Honor.

The Court: Who is his attorney?

Q. (By Mr. MacInnis): Who is your attorney?

A. Mr. McDonald.

The Court: I think you had better be careful

(Testimony of Henry J. Gourdine.)

not to question this witness about something that might affect his own case. I do not know what the charge is.

Mr. MacInnis: It is my understanding his attorney knows he is coming here.

The Court: You realize as much as I do the obligation you would be assuming now asking him questions.

Mr. MacInnis: I would rather not assume the obligation without some explicit direction from his attorney, since your Honor has brought that problem up.

The Court: I haven't the faintest idea what you are going to ask him about. But I remembered the name. This case was set for trial, and it had to be continued, either because the defense attorney was sick, or some Government witness was sick.

Mr. Davis: Yes, your Honor, this defendant is a defendant [44] in another case.

The Court: In this same case?

Mr. Davis: Yes, he is a defendant in this case.

The Court: I do not see his name here. Oh, yes, Henry Gourdine.

Q. (By Mr. MacInnis): Mr. Gourdine, have you discussed with Mr. McDonald the fact that you were going to testify in the case against Renaldo Ferrari?

A. Well, to a certain extent, yes.

Mr. MacInnis: I do not want to do anything, as his Honor points out.

(Testimony of Henry J. Gourdine.)

The Court: You will have to make your own decision in the matter. I am calling it to your attention. I observe now Mr. Davis says he is a defendant in the case. His is one of the cases that is set next week.

Mr. Davis: No, your Honor. This one was continued at Mr. McDonald's request.

The Court: This man is a defendant in the case. I do not want to tell you not to do anything that you feel you should do in another case, but that is a rather serious responsibility.

Mr. MacInnis: Here is what I will do, your Honor: I can defer putting him on the stand until later, and I will discuss every element of the testimony which we wish to adduce with Mr. McDonald.

The Court: It may be it has no connection with himself, but [45] his attorney is not here. It would be more prudent to find out from Mr. McDonald if it is all right for him to testify.

Mr. MacInnis: I would rather accept your Honor's suggestion.

The Court: You may step down.

Mr. MacInnis: Mr. Bruno.

The Court: The conviction of Bruno was not in this case?

Mr. Davis: No, your Honor.

The Court: That was in a separate case unrelated to the charge here?

Mr. Davis: Yes.

Mr. MacInnis: I understand, your Honor, the other charges against the defendant Bruno have been dismissed.

The Court: Yes.

Mr. MacInnis: If that is not so I will have a similar problem.

Mr. Davis: No, that is not so, your Honor. All the charges against Bruno, Flier, and Billeci have not been dismissed. They have only been dismissed as to the counts in which they were connected with Pitta or with this defendant. But there are several separate counts in this indictment against Bruno and Flier.

Mr. MacInnis: Then, your Honor, I am in a peculiar position. We came here yesterday. While I did not ask affirmatively for any continuance, the only reason I would have [46] been unwilling to go ahead yesterday at ten o'clock would be because of the fact that I intended to call other persons who were involved in the same charges, and I had understood by the end of yesterday to these three men whose names I have given the court the matters would be terminated. Now, of course, I do not want to be in the position of jeopardizing any other person, and I won't be put in that position, but it has been my understanding from everything except the last statement made by Mr. Davis that the cases were over.

Mr. Davis: I do not believe that is the case, your Honor. I do not know. So many things have transpired here in the last couple of days in dismissals

that there were entered; but I do know this: In any case—for example, in the case yesterday of Joseph Pitta, where he was connected with any other defendant, Flier, Bruno or Billeci, I dismissed them in those counts so we could proceed to trial.

The Court: And they are dismissed——

Mr. Davis: As to this defendant.

The Court: As to this defendant.

Mr. Davis: But I do not think as yet I have entered a general dismissal of 30449 as to all defendants.

The Court: If you do not intend to ask this witness Bruno anything except concerning matters pertaining to your client's case, I do not see any objection to putting him on.

Mr. MacInnis: It is hard to keep from going over the threshold, [47] your Honor.

The Court: That is something you will have to decide, yourself. I can't direct the United States Attorney to dismiss the charge against a man so you can use him as a witness.

Mr. MacInnis: I was reasonably sure I had heard him make those dismissals. I did not, of course, write down the names of the particular counts.

Mr. Davis: There would not have been any occasion for me to dismiss them, unless I dismissed them previously in connection with their own cases: For example, when Bruno was convicted and sentenced I still had to keep this other indictment alive, and I do think I dismissed it as to them, and that

is the only occasion I would have had to dismiss as to Bruno, Flier, or Billeci, generally, because I only had to dismiss in the particular counts, as in Mr. Pitta's case yesterday. I may be mistaken. The state of the record may show I have dismissed them, but I do not think it does.

Mr. MacInnis: I am positive I heard Mr. Davis use this kind of language, and I would like him to correct me if I am wrong, that he said, "We are not going to proceed against certain named defendants further."

Mr. Davis: At that time I did not intend to proceed. As a matter of fact, this may cause me to change my mind.

Mr. MacInnis: Between the two things, your Honor, of [48] requiring me to proceed at present without any knowledge, and on the other hand required by the United States Attorney to investigate his own record and determine what cases are still in existence——

The Court: Counsel, there is nothing I can do to help you in that regard. I am not going to make any orders directing the United States Attorney to dismiss a case.

Mr. MacInnis: I do not ask that, at all.

The Court: If you want to use a witness you will have to make up your mind whether you are going to use him, or not. I am not going to postpone the case to see what the United States Attorney is going to do in some matter pending against the witness before you use him. That would throw litigation into complete confusion.

Mr. MacInnis: It seems to me it is a little confusing if we do not know now whether there are in existence any cases against these men I have named, because if they are important witnesses for this suit, surely he should be given every right to call them.

The Court: I am not stopping you from calling them. You can call him and put the man on the stand. All I called your attention to was, in the case of the other witness, he had another case pending entirely separate from this case.

Mr. Davis: In other words, your Honor, I think I can clarify it this way. At the time these men were tried I made the [49] representation to your Honor and to their attorneys, that is, Bruno, Flier and Billeci, that if they were convicted in the cases in which they went to trial, the Government did not intend to proceed against them in other cases which they had pending. I do not believe as yet we have dismissed those cases.

The Court: That is my recollection.

Mr. MacInnis: That is mine, too.

Mr. Davis: My third observation is this, that that was my opinion at that time. I did not make any guarantee that if something else transpired in the meantime which might change my position, I would not proceed to try them in these other cases. Merely because Mr. MacInnis wishes to use them as witnesses cannot force me to dismiss a case that I have pending against a man. If he wishes to use him as a witness, that is all right with me. I may

use him later. But I am not going to dismiss so that he can use him as a witness with impunity.

Mr. MacInnis: I do not ask counsel to do that, but I think Mr. Davis, with all respect to him, has taken a rather anomalous position. My recollection now is apparently the same as his and your Honor's as to what he said. But he says now "That was my intention at that time. I didn't guarantee at some future time, if something changed, I would not change my mind." I do not know how we can proceed in this kind of [50] matter if that is his ambiguous position.

Mr. Davis: It is not ambiguous at all. I can be very plain about it. Suppose one of these defendants took the stand and from information I have at my disposal, in my opinion, committed bald perjury in order to try to get acquainted some of the other men who were working with him, saying, "This man was never in my place"—that probably would change my opinion as to whether I would prosecute him further. If he merely takes the stand and tells the truth, he probably would not be prosecuted. But if he took the stand, after being convicted and sentenced, and tried to whitewash other defendants whose cases are still pending, that might change my position. That is my frank statement. That is why, as your Honor knows, in cases where you have co-defendants, we put off sentencing until the disposition of the case. I am certainly not going to remove all possibility of further jeopardy against these defendants so that they can take the stand

without having any feeling in the matter, and tell whatever story they wish. However, if they take the stand and tell what I know or believe to be the truth, I am still of the opinion I would dismiss as against them.

Mr. MacInnis: I consider Mr. Davis' statement an impropriety, that he should tell your Honor what he knows to be the truth, any more than I should tell what I know to be the truth.

The Court: I consider this whole argument completely [51] extraneous to the issues in this case and I am not going to be concerned with it any longer. You can put on any witnesses you want. I made merely a suggestion to you before in connection with the other witness, Mr. Gourdine, who was a defendant in another case, as well as a defendant in this case, in the absence of his attorney, and for his protection. I suggested to you as an attorney, and also the court, that it might be well to look into the matter further before you put a defendant in another case on the witness stand. That is in the interest of justice. That is the duty of a judge as well as an attorney, and an officer of the court. You elected to withdraw that defendant for the time being. Now you want to put on a defendant, another man who has already been convicted in another case and is under sentence. If you want to put him on the witness stand, that is up to you.

Mr. MacInnis: Very well. I will stay within the limitations of the two charges here which are dismissed as against this defendant. Mr. Bruno, will you step up, please?

VINCENT BRUNO

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

The Clerk: State your name to the court.

A. Vincent Bruno.

Mr. MacInnis: Your Honor, may I withdraw the pictures [52] introduced this morning in the Pitta case? They were pictures belonging to me, which I loaned the other attorneys.

The Court: Very well.

Mr. MacInnis: I think they were introduced for identification.

The Court: They were marked for identification.

Mr. MacInnis: But they were refused entry into evidence.

The Court: They were marked A, B, C and D.

Mr. MacInnis: It is my understanding your Honor refused them entry in evidence on the ground of lack of foundation.

The Court: In the case of United States vs. Pitta.

Mr. MacInnis: Solely to throw some light upon what could have been seen and to what extent it could have been seen, I am going to introduce those.

Q. Mr. Bruno, are you familiar with the bar and tavern here in San Francisco known as the Stardust? A. Yes.

Q. Are you familiar with the fact that there was a back room attached to that particular tavern?

A. Yes, sir.

(Testimony of Vincent Bruno.)

Q. Have you been informed, or have you seen with your own eyes certain physical facilities where Government agents stationed themselves in the course of conducting an investigation?

A. I do not understand the question.

Q. Have you seen the place pointed out to you as the spot where certain Government agents placed themselves for the purpose of [53] looking through peepholes? A. Yes, I did.

Q. Were you familiar with those premises in the months of January and February of 1946?

A. Very well.

Q. Were you present at the time certain photographs of various aspects of the interior of those premises were taken by a professional photographer? A. No, I was not.

Q. Do you know the date these pictures were taken?

The Court: The photographer said some time in May, 1946.

Q. (By Mr. MacInnis): Were you familiar with the appearance and aspect of those premises in the month of May? A. Yes, I was.

Q. Between the months of January and February, continuously up to the end of the month of May, at least, 1946, was there any change?

A. No, not with the back room.

Q. The premises were exactly the same, so far as any photographs of the back room would be concerned, entirely throughout the month of May as

(Testimony of Vincent Bruno.)

they were throughout the previous months of January and February, is that correct?

A. Yes, they were.

Mr. Davis: If the court please, I am going to object to the introduction of these photographs on the ground the proper [54] foundation has not been laid. The offense was committed in January, and the pictures were taken in May. The only attempted foundation here is that this witness is familiar with the premises and as a matter of his opinion he can say that those pictures represent the condition in January, and I do not think that is a sufficient foundation.

Mr. MacInnis: That is the only foundation ever necessary. A witness, to identify a picture, only has to state that the picture is a fair representation of the particular object, and the only connection under the law——

The Court: I am not going to waste any time on it. Do you want to offer these photographs in evidence?

Mr. MacInnis: Well, I do.

The Court: All right. I will admit them in evidence.

Mr. MacInnis: We formally offer these pictures in evidence and ask that they be labeled Defendant's Exhibits in the order in which they are.

The Court: These are the same ones as in the other case?

Mr. MacInnis: They are the same group. They are supplemented. Apparently not all of them were presented in the previous case.

(Testimony of Vincent Bruno.)

The Court: Has this witness seen them all?

Mr. MacInnis: I will show them to him, your Honor.

Q. I show you a picture labeled "Photo of Merchandise Shelf, Showing Peepholes Behind Merchandise. The shelf is 26 inches [55] wall to front, 38 inches from ground to peepholes. Peepholes are 3½ x 6½ inches——"

The Court: I do not think you need to go into all of that. I will save a great deal of time for all parties concerned. The photographer in the case of *United States vs. Pitta* testified he took these photographs in May, 1946, in these premises out there.

Mr. MacInnis: Yes.

The Court: On the strength of that testimony in the other case I will admit them in evidence in this case.

Mr. Davis: I do not like to delay the matter, but, of course, there were only four pictures that the photographer testified he took in May, 1946, or any other time. These others appear that they might be pictures taken there, but frankly, no one has identified those.

Mr. MacInnis: I have not come to them yet.

The Court: Have you got the photographer here?

Mr. MacInnis: No, I can bring him, but that would not be a necessity. If I drew a picture in pencil and showed it to him——

The Court: Do you want this witness to testify that those pictures show to the best of his recollection the condition of these rooms in May, 1946?

(Testimony of Vincent Bruno.)

Mr. MacInnis: That is the question I will put to him, and that is the answer I expect, your Honor.

The Court: Is that correct? A. Yes.

Q. Would you say that that is so?

A. I would have to look at them first.

The Court: Show them to him.

Mr. MacInnis: It is my information the premises were untouched.

The Court: Well, I heard other witnesses on that. I am not going into the question of the weight of this testimony; I am not going to spend all day with these photographs.

Mr. MacInnis: I do not claim it is the whole case, your Honor.

The Court: I did not say that. I said I am not going to spend all day on these photographs.

Mr. MacInnis: Your Honor, I am not trying to spend all day on them. I am just trying to put them in for whatever they may be worth.

The Court: But you started to read from each legend on them.

Mr. MacInnis: I started to read from them because Mr. Davis said he had no knowledge of what they were. If you do not want me to say what they are, I will not do so.

The Court: Give the bunch of photographs you have in your hand to the witness and let him look at them, himself, and after he has looked at them, ask him whether those photographs [57] show the appearance of the place in May, 1946.

Mr. MacInnis: I might say this while he is look-

(Testimony of Vincent Bruno.)

ing at them. I do not subscribe to the proposition that it was impossible to see anything from that room. I think there were some difficulties attendant to observation, and for that I am going to offer the pictures, and I think they have some weight in that particular. I would not be so foolish to give them to the court and say they could not see anything.

The Court: I do not know what you mean by that. I am admitting them in evidence because you are offering them for some purpose in connection with the defense.

The Witness: There are three here that are not the liquor room. They must be some other rooms. These three are not the liquor room.

The Court: How many have you left there?

A. These are all the liquor room.

Mr. MacInnis: I will offer the group which the witness identified.

The Court: How many are there?

Mr. MacInnis: 8, your Honor.

The Court: All right. Those eight photographs correctly depict the appearance of this room in May, 1946?

The Witness: That was the room all the time I was in the place.

The Court: You may mark those eight photographs in evidence, [58] Defendant's A-1 to A-8.

(The photographs in question were thereupon received in evidence and marked, respectively, Defendant's Exhibits A-1 to A-8.)

(Testimony of Vincent Bruno.)

Mr. MacInnis: I will withhold the others and introduce them through another witness. Does your Honor wish to look at them?

The Court: I saw them.

Q. (By Mr. MacInnis): Mr. Bruno, on the 5th day of January of 1946, in the premises known as the Star Dust, in the liquor or storeroom, as it has been called, in those premises did you see Renaldo Ferrari take in his hand a bindle of heroin or sniff any portion of it by use of a knife?

A. Ferrari never did sniff heroin. He always told us never to use it. He told me never to use it. I never seen him in my life take a sniff of it.

Q. You never in your life saw Ferrari sniff heroin? A. Never in my life.

Q. It is your testimony here, "He told us never to use it?" A. That is right.

Q. Will you tell us what you mean by that, and who you mean by "us?"

A. We always talked about it, and he said, "Never use it. You guys are crazy if you ever use that."

Mr. MacInnis: That is all. [59]

Cross-Examination

By Mr. Davis:

Q. Isn't it a fact, Mr. Bruno, that on January 17th, at about 11:35 in the evening you were in the storeroom and saw the defendant use a bindle of heroin? A. I never did in my life.

(Testimony of Vincent Bruno.)

Q. Isn't it a fact that on January 28th, at about 5:25 in the evening, you were in the liquor store-room and saw the defendant hold in his hand a bin-dle of heroin and sniff it in his nostrils by sniffing it off a knife blade?

A. Ferrari never used heroin in his life, never handled it in my presence.

Mr. Davis: That is all.

Mr. MacInnis: No questions.

The Court: Has the Marshal custody of Flier?

The Marshal: No, your Honor. We had no order.

Mr. MacInnis: I was wondering if you still had him in custody.

The Marshal: He is in the County Jail. We have no order to produce him yet.

Mr. MacInnis: May we have your Honor's order that he be produced tomorrow morning at any hour acceptable to the court?

The Court: Did you intend to offer the same kind of testimony?

Mr. MacInnis: Testimony a little more extended from the defendant Flier and testimony of about the same length from [60] the defendant Salvatore Billeci, and the testimony of the defendant Gour-dine, if it meets with the explicit permission of his attorney.

The Court: You mean each of these witnesses is going to say that they never saw the defendant in this case take any heroin?

Mr. MacInnis: More than that, your Honor.

The Court: I am not trying to pump you. I am just trying to find out if there might be some way of facilitating the trial.

Mr. MacInnis: I do not mind your trying to pump me. I will tell you everything they would say. It has been my information during the entire course of this case, not based upon my own client's word to me, but from all the others, to the effect that he hung around with them, that he was in and out, that he was at the Star Dust. It will be his testimony he was there on various occasions, but that he was not engaged in any narcotic traffic, and that he is not a user of heroin, and one of the best items of evidence that I think proves it according to the intendments of human nature, is that Ferrari, who, as I said, is not a saint, is a rather heavy drinker of alcohol. The defendants in this case—and I hope I say this without prejudice to any other person, even those who have been involved in alleged sale transactions with the Government—say that he is not one of them. [61]

The Court: Just a moment, Mr. Marshal. I will cut this short. You want to produce further witnesses on the point that the defendant was not present on the occasions that the agents testified to, and did not have possession of any heroin?

Mr. MacInnis: Not quite that, your Honor. According to what the defendant tells me, he may well have been in the Star Dust on the 17th of January.

The Court: I do not want to cut you off. If the defendant wants to produce any testimony to the effect that he was not in the possession of any heroin

at the place and at the times that have been testified to by the agents, he has a perfect right to so testify, if that is a fact, so far as he was concerned. I am not stopping him from doing that. I just want to find out if that is what you want to do.

Mr. MacInnis: I think the testimony of Flier is so emphatic upon that point it may be that your Honor is going to invite a stipulation as to what the other testimony would be, so as to save time. I would appreciate it if the court could listen to his testimony.

The Court: What is the witness?

Mr. MacInnis: Flier.

The Court: All right. You want him brought here in the morning, then?

Mr. MacInnis: I would deeply appreciate that, your Honor.

The Court: You do not have to put it on that ground. If [62] you want him here, Marshal, bring Flier here at ten o'clock.

Mr. MacInnis: Or earlier, if your Honor wishes.

The Court: Do you want them both here?

Mr. MacInnis: Billeci's testimony will be much to the same import as Bruno's testimony.

The Court: Namely, that he never saw Ferrari taking any heroin, is that it?

Mr. MacInnis: Yes.

The Court: Would you be willing to make the stipulation that if Billeci were called he would so testify?

Mr. Davis: Yes, I will stipulate if he were, he would so testify.

The Court: Would that cover what you want?

Mr. Davis: As to Billeci, I would accept that. As to Flier I think he is an available witness.

The Court: Will the Marshal bring Mr. Flier here at ten o'clock tomorrow morning. Any other witnesses that you will have?

Mr. MacInnis: The only witnesses will be Mr. Gourdine, if his testimony gives the specific permission; the defendant in the other case, Flier, and Ferrari, himself.

The Court: All right. I will continue the trial of this case until tomorrow morning at ten o'clock.

(An adjournment was thereupon taken until tomorrow, Thursday, April 24, 1947, at ten o'clock a.m.) [63]

Thursday, April 24, 1947, 10:00 o'Clock A.M.

The Clerk: United States vs. Ferrari, for trial.

Mr. MacInnis: For the purpose of saving time, your Honor, I understand Mr. Davis is willing to stipulate that if Mr. Nathanson, the photographer who testified in the case of United States vs. Pitta yesterday morning, were to be called here on behalf of the defendant Ferrari, that he would give precisely the same testimony and we in turn would be willing to stipulate that Mr. Davis would subject him to the same cross-examination and that he would give the same answers.

Mr. Davis: I will so stipulate.

The Court: In the case of United States vs. Pitta.

Mr. MacInnis: Yes, your Honor, and in conjunction with that stipulation we would ask for the Court's order stating in effect that the Court would consider that evidence along with the photographs which have been admitted in this case. Mr. Nathanson apparently is the man who took those photographs.

The Court: Very well.

Mr. MacInnis: You will stipulate that he is the person who took the photographs?

Mr. Davis: Oh, yes. The only difficulty for the record is in the other case they were not admitted in evidence.

The Court: It is stipulated that the photographer who [64] testified in the Pitta case, if called, would testify that he took the photographs that were admitted in evidence in this case some time during the month of May, 1946?

Mr. Davis: That is right.

The Court: Will that cover it?

Mr. MacInnis: Yes, your Honor, and his testimony may be deemed incorporated in the record of this trial?

Mr. Davis: That is agreeable.

The Court: All right.

(The testimony of Mr. Gibbs is as follows:)

ROBERT GIBBS

called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

Q. (By the Clerk): State your name to the Court and Jury. A. Robert Gibbs.

(Testimony of Robert Gibbs.)

that these represent the pictures that you took (handing pictures to witness).

A. Yes, I took all of them.

Q. When did you take those pictures?

A. Approximately in May. [66]

Q. Of that year? A. 1946.

Mr. Klein: Now, may it please the Court, I submit that I have laid the foundation for asking him to identify these pictures and offering them.

Mr. Davis: Your Honor, obviously the pictures are improper. They were taken in May, 1946, and we are talking about something that happened on one particular day, January 10, 1946.

The Court: What is the materiality of this?

Mr. Klein: I want to show by photograph the the condition of that storeroom with reference to shelves and bottles, and it has been testified to by Mr. Bruno that the condition of those shelves and bottles on those shelves is the same for the last sixteen months.

Mr. Davis: I can't see how there has been sufficient foundation to introduce in evidence and make a part of the record in evidence photographs taken months after this affair.

Mr. Klein: These pictures are offered for the limited purpose of showing the condition of that room, the shelving and the bottles on the shelves.

The Court: Yes, but that does not show the condition of the bottles or the contents on the day that that is charged in this indictment. [67]

(Testimony of Robert Gibbs.)

Mr. Klein: Leaving out the bottles, if it please the Court, they are offered for the limited purpose of showing the shelving.

The Court: I would not allow them in evidence, because that would be error and would be misleading. You can't take something out of a photograph and say you are offering something else in the photograph. You do not need a photograph to show the condition of the shelves. The witnesses have described it. If you had a picture of the empty shelves, that might be one thing. I think the evidence is completely without foundation. I will sustain the objection.

Mr. Klein: Exception.

The Court: That is all.

Mr. MacInnis: Call Mr. Flier, if the Court please. While we are waiting, I would like to make this statement about the witness Gourdin, who was called yesterday. I was grateful to your Honor for the suggestion, of course, with respect to his rights. I have attempted to get in touch with Attorney MacDonald, and if there is a recess this morning, I understand he is going to be in his office about ten-thirty. He was not in either last night or this morning early. I understand he stopped for a brief court session in the state courts. The testimony of Gourdin does not touch upon any matter with which Gourdin stands charged, so I think by a [68] brief session with Attorney MacDonald I will probably be able to obtain the permission.

The Court: Very well.

FRANK FLIER

called as a witness on behalf of the defendant; and being first duly sworn, testified as follows:

Q. (By the Clerk): State your name to the Court. A. Frank Flier.

Direct Examination

By Mr. MacInnis:

Q. Mr. Flier, you know the defendant, Renaldo Ferrari? A. Yes, sir.

Q. And you have known him for about what period of time?

A. Since about 1943, the early part of 1943.

Q. Upon the fifth day of January of 1946, in the Star Dust Bar or tavern here in San Francisco, did you observe the defendant Renaldo Ferrari using, inhaling, or in any fashion partaking of the drug known as heroin?

A. I do not recall the date, but as long as I have ever known Renaldo Ferrari he has never used heroin in my presence.

Q. Have you ever had any conversation with Renaldo Ferrari with respect to his usage or non-usage of heroin or any other narcotic?

A. The only conversation I have had with Renaldo Ferrari with [69] regard to heroin is when he told me to back away from it. He says, "You are fooling with dynamite."

Q. A conversation of that import took place between you and Ferrari about when?

A. The conversation of what?

(Testimony of Frank Flier.)

Q. The conversation——

A. What I just answered?

Q. Yes. He said to you to keep away from the stuff, that you were fooling with dynamite?

A. A number of times.

Q. If the same questions were put to you with respect to January 17, 1946, and January 28, 1946, which are the other two dates covering the charges against Renaldo Ferrari, would your answers be the same?

A. My answers would be—I don't recall the dates, but I know he has never used it in my presence, and has been against it as far as—to me—telling me to go to the hospital, and everything else, and to forget about it.

Q. Tell me whether or not this is true, that before this case came to trial, in the months that marked the progress of this case toward trial, have you remarked before that Renaldo Ferrari, regardless of what might be the case with respect to any other person in this charge, was himself innocent?

A. I have always maintained that he was innocent, as innocent [70] as anyone that walked the streets.

Q. Have you any personal knowledge by way of explanation to supplement what you say about Ferrari?

A. I don't quite understand you on that question.

Q. I mean, is what you say about Ferrari based upon your personal knowledge, rather than on mere opinion?

(Testimony of Frank Flier.)

A. No, I know for a fact. He has always been against it.

Mr. MacInnis: That is all.

Mr. Davis: I have no questions.

Mr. MacInnis: Call the defendant to the stand.

RENALDO FERRARI

called as a witness in his own behalf; and being first duly sworn, testified as follows:

Q. (By the Clerk): State your name to the Court. A. Renaldo Ferrari.

Direct Examination

By Mr. MacInnis:

Q. Your name is Renaldo Ferrari, is that correct? A. That is right.

Q. You live here in San Francisco?

A. That is right.

Q. At what address?

A. 144 Pinehurst Way.

Q. You have lived in San Francisco for how long? [71] A. 35 years.

Q. You were born here?

A. That is right.

Q. And have lived here all your life, is that correct? A. That is right.

Q. Are you acquainted with the bar or tavern premises known as the Star Dust? A. I am.

(Testimony of Renaldo Ferrari.)

Q. You have been acquainted with those premises about how long?

A. Ever since they opened.

Q. What was the nature of your entry at any particular time into those premises?

A. What reason, you mean?

Q. Yes.

A. Well, to drink, to meet people, talk to them—there were a lot of people that I knew there.

Q. Did you go there often?

A. Quite often.

Q. Calling your attention to the periods of time covered by the indictment in this case lodged against these various other persons, were you in and out of the Star Dust cafe or bar at various times during those months?

A. Well, I will say yes, I was in and out quite a good many times. [72]

Q. You are acquainted with all the other defendants in this case, isn't that correct? A. I am.

Q. You are reasonably friendly with all of them?

A. That is right.

Q. They are persons with whom you have had conversations on numerous occasions, is that right?

A. That is right.

Q. Have you met them on various occasions in the Star Dust Cafe? A. Yes, I have.

Q. Purely to supplement the record—some of the pictures were not identified by the witness Bruno yesterday—I am going to show you four

(Testimony of Renaldo Ferrari.)

photographs, one at a time, and ask you to state for the record what they represent. I will show you the first one.

A. This represents where the officers were supposed to have seen what was in the liquor room.

Mr. MacInnis: We ask that this picture be marked Defendant's next in order.

(The photograph in question was thereupon marked Defendant's Exhibit A-9 in evidence.)

Mr. MacInnis: I will show you a second picture.

A. This is a picture of the men's lavatory, the elevator going upstairs to the apartment, and the hallway. [73]

Mr. MacInnis: We ask that this be marked Defendant's next in order.

(The second photograph was thereupon marked Defendant's Exhibit A-10 in evidence.)

Q. (By Mr. MacInnis): I show you a third picture.

A. This is a picture showing the door to the liquor room and a door that enters to the room where the Agents were behind.

Mr. MacInnis: We ask that this be introduced as Defendant's next.

(The third photograph was thereupon marked Defendant's Exhibit A-11 in evidence.)

Q. (By Mr. MacInnis): I show you the last and fourth picture.

A. This is a picture of the men's lavatory and the hallway entrance to the back of the building.

(Testimony of Renaldo Ferrari.)

Mr. MacInnis: We ask that this likewise be introduced.

(The fourth photograph was thereupon marked Defendant's Exhibit A-12 in evidence.)

Q. (By Mr. MacInnis): Mr. Ferrari, you have seen all of the photographs which have been introduced in your case, have you not?

A. Yes, I have.

Q. Were you present when those photographs were taken? A. I was.

Q. Do you know as a matter of fact that they were taken in the month of May in 1946 by the photographer, Mr. Nathanson? [74]

A. That is right.

Q. To your knowledge, was there any change in the condition of those premises in any respect as shown by the pictures between the months of January and February and the time in May when the pictures were taken?

A. From the time that this case, as I can remember back—and this was all told to us when we were arrested—we all talked about it, and they got together and got these pictures taken as soon as possible after that. And nothing was to be changed—left there as it was when they were supposed to be there.

Q. To put it this way, do you know of your own knowledge, based upon your visits to the same premises, that they were in exactly the same situation when the pictures were taken as they were during the months of January and February?

A. Yes, they were.

(Testimony of Renaldo Ferrari.)

Q. Calling your attention first to the charge made against you concerning your alleged activities on the night of January 5 of 1946, have you any knowledge or recollection now as to where you were on that particular night as distinguished from the other two nights mentioned in the evidence?

A. In Palm Springs.

Q. By what means do you make that recollection for the Court?

A. By the cowboys, by the people that run the place. I was riding on the horses. [75]

Q. When did you go down to Palm Springs at that particular time in 1946?

A. I had been going down there for a month or so previous to that.

Q. Were you back in San Francisco at various times? A. Yes, I have.

Q. I suppose that it is true that you may well have been in San Francisco, and in the Star Dust, upon the 17th of January?

A. Could have been, yes.

Q. And that you likewise may have been in those premises on the 28th of January?

A. Could have been, yes.

Q. With respect to the 5th of January, is it your testimony that you were not in fact in San Francisco on that particular night?

A. That is right.

Q. I show you a piece of paper, which I have already displayed to Mr. Davis, which is a statement of the Rogers Ranch Stables, Palm Springs,

(Testimony of Renaldo Ferrari.)

California, addressed to "Mr. Red Ferrari, c/o Henry Gore, 1643 Beech St., San Francisco." Can you tell us what that statement is?

A. That is riding charges, like if I went out an hour, it would be a dollar and a half.

Q. What date is shown first as a riding charge, presumably for horseback riding, against you? [76]

A. January 6.

Q. What year is that? A. 1946.

Q. Have you any means of informing the Court that the date represented upon that statement is in fact 1946 and not 1947?

A. Well, the only thing I have here is the envelope, but we can write to the stables and have it verified by their bookkeeper and their cowboys.

Q. I show you an envelope bearing a cancelled stamp and postmark, and ask you what year is shown upon the envelope?

A. April 22, 5 p.m., 1946.

Q. Is that the envelope in which that statement was delivered to you? A. Yes, sir.

Q. Were you accompanied by any person upon the particular visit to Palm Springs that you have just now described? A. Yes.

Q. Who?

A. Not to Palm Springs. I drove from here to Palm Springs and stoped at Henry sister's, stayed there and had dinner, at Sierra Madre, California.

Q. About when, as best you now remember, did you leave San Francisco upon the trip that you are now narrating?

(Testimony of Renaldo Ferrari.)

A. That I am not sure. I am not positive of that.

Q. Are you positive that you drove? [77]

A. Yes, sir.

Q. About how many hours would it take you to drive to Palm Springs?

A. Well, if I went direct to Palm Springs, about twelve or thirteen hours.

Q. Calling the Court's attention again to the date shown on here, January 6, as the first day of riding, does that indicate to you in any positive fashion that you could not have been in San Francisco upon the evening before?

Mr. Davis: I object to this, your Honor. I have permitted all of this to go in up to this point, although a lot of it has been inadmissible, but I am going to object now on the ground that it calls for the opinion and conclusion of the witness.

The Court: I think that objection is good.

Mr. MacInnis: I think it is technically correct, your Honor. What I meant to elicit from the witness is a statement—he is charged with doing a certain act in the late evening of January 5, and he has a statement here showing he was riding horses in Palm Springs upon January 6. The bill does not—

The Court: Of course, that would be argumentative.

Mr. MacInnis: That is right. To cover another point:

(Testimony of Renaldo Ferrari.)

Q. The statement here is addressed to you in care of a person whose name is listed here as Henry Gore. Who is that person?

A. That is Henry Gourdin in this building. [78]

Q. Is there any particular reason for that change of name? A. No.

Q. Does this statement differentiate between those items which were charged to Henry Gourdin and those which were charged personally to you?

A. They do.

Q. In fact, are there two items upon the statement which show the name "Henry" in parenthesis? A. That is when Henry rode.

Mr. MacInnis: I would like to show the statement to the Court, if I may.

Q. And you were in receipt of that envelope and the statement contained in it before the present indictment which has now been brought to trial was lodged against you, is that correct?

A. That is right.

Mr. MacInnis: We offer the envelope and statement in evidence as Defendant's next in order, if the Court please.

Mr. Davis: If the Court please, I object to its introduction in its present form, for the reason that it is not the best evidence for the purpose offered. Counsel says he offered it for the purpose of establishing that the defendant was riding horseback in Palm Springs on January 6. It does not prove that at all. It merely proves he received a bill for somebody riding horseback. I will admit it could

(Testimony of Renaldo Ferrari.)

be admitted for the purpose of showing that he did receive a [79] bill, but not for the purpose of showing that he himself was riding horseback there on January 6.

The Court: I will allow it in evidence for whatever it is worth. I do not think I have to make any ruling as to what purpose it is admitted for.

(The statement and envelope in question were thereupon received in evidence and marked Defendant's Exhibit B.)

Q. (By Mr. MacInnis): Speaking again of the statement which is now introduced in evidence, there are certain gaps in the continuity of dates upon that statement, isn't that correct?

A. That is right.

The Court: The statement speaks for itself. I saw that.

Q. (By Mr. MacInnis): For example, between January 8 and January 21 there are no items charged against you? A. No.

Q. Is it your recollection that you probably came back to San Francisco during that interim?

A. It is.

Q. Following January 20 there is no further item charged against you personally. Does that indicate that you probably returned to San Francisco after January 20? A. Yes, it does.

Q. On the 17th day of January, the date upon which you stated you were probably in San Fran-

(Testimony of Renaldo Ferrari.)

cisco, did you go, according to your best memory, to the Star Dust Cafe? [80]

A. Yes, I think I did.

Q. What do you recall generally as the activity engaged in by yourself at those premises upon that evening?

A. Well, I have always drunk, and I always like to drink with people. I know I was well treated there, and that is where I went all the time, for that particular reason. I could go next door or across the street. But they were people I liked and people I knew were there.

Q. Would your testimony be the same with respect to the 28th of January, 1946?

A. It would.

Q. Upon either of those dates, according to your best memory, did you go into the back room of the premises? A. Possibly. I don't know.

Q. You were familiar with the room described by the Agents as the back room or liquor storage room, is that correct? A. Yes, I was.

Q. You had been in it on some occasions?

A. Yes, I have.

Q. Did you on either of those dates, January 17 or January 28 of 1946, partake by inhaling or otherwise of any quantity of the narcotic known as heroin or any other forbidden narcotic?

A. No, I did not.

Q. Are you a user of narcotics?

A. No, I am not. [81]

(Testimony of Renaldo Ferrari.)

Q. When you told the Court that you are a drinking person, to what extent to you ascribe that habit to yourself?

A. Well, I just like to drink. I go to all the bars. I have many friends. They are all bartenders, bar owners, and no other reason. I enjoy it. That is my enjoyment.

Q. You are acquainted, as you stated before, with Frank Flier, who testified here?

A. Yes.

Q. And with Vincent Bruno, who likewise was called as a witness on your behalf yesterday?

A. That is right.

Q. You are acquainted, too, with Salvatore Billemi, is that correct? A. That is right.

Q. Have you at any of the dates mentioned or any other time partaken of heroin or any other narcotic in the back liquor room of the premises known as the Star Dust?

A. No, I have not.

Mr. MacInnis: That is all.

Cross-Examination

By Mr. Davis:

Q. Mr. Ferrari, when you examined these pictures and said that they represented the exact condition, that although the pictures were taken in May of 1946, they represented the exact condition of the premises in January of 1946, I take it by that you mean the actual physical parts of [82] the build-

(Testimony of Renaldo Ferrari.)

ing. You do not mean to say that the liquor bottles and boxes were always the same during that time, do you?

A. Yes, exactly, just as they were taken.

Q. Do you mean that from January of 1946 to May, 1946, those bottles were never moved or changed at all?

A. No, because it was all rum. You can see that those things do not sell. They are dead stock.

Q. Look at all the pictures. Do you mean that during that six months' period cases, boxes and bottles were never altered in there at all, is that correct?

A. Well, when they took the pictures, some of the pictures, something had to be—for the photographer to take them, to move his stand, moved the boxes and things on this side, not moving anything where the hole has been.

The Court: That is not what the attorney means. He means were the same bottles there in May, 1946, that were there in January, 1946, in the same places.

The Witness: Yes, they look just exactly the way they were.

Q. (By Mr. Davis): The only distinction that I think ought to be added to that question, you do not mean the precise bottles, or do you mean the precise number of bottles?

A. There might have been one or two bottles which were taken out, which would be in the front. Everything would be just as it is there. [83]

Q. Just exactly the same? A. Yes.

(Testimony of Renaldo Ferrari.)

Q. Isn't it a fact, Mr. Ferrari, that on January 5, January 17 and January 28, of 1946, you were actually in the storeroom of the Star Dust Bar, and that you used heroin there by taking some of it out of a bindle on the blade of a knife and sniffing it? A. No.

Q. Have you ever been convicted of a felony?

A. No.

Q. You have not? A. No.

Mr. Davis: That is all.

Mr. MacInnis: No questions.

The Court: Is that all, Mr. Davis?

Mr. MacInnis: That is all of this witness.

Will Mr. Davis stipulate that if Mr. Henry Gourdin were called to the stand that he would testify that the defendant Ferrari was with him at Palm Springs and went horseback riding with him on the sixth day of January, 1946?

Mr. Davis: Pardon me. I didn't hear that.

Mr. MacInnes: Would you stipulate that if he were called to the stand—

The Court: Is he here now?

Mr. MacInnes: He is not in the room, your Honor. I might [84] state to the Court I am unable to discover any count against Henry Gourdin except a count which mentions February 1 of 1946. That is not a date which is connected with the charge against the defendant.

The Court: What is the charge against him in this other indictment?

Mr. MacInnis: That has nothing to do with this case.

The Court: If you are going to limit the testimony to that, I do not see any objection to your calling him.

Mr. MacInnis: If the stipulation would be accepted, that is all I am going to ask him, merely to corroborate the date of January 5. As your Honor knows, there is some confusion about that date, anyway, in view of the variance between the indictment and the proof. Will you make that stipulation?

Mr. Davis: That is, if Henry Gourdin was called, he would testify that on January 6 was horseback riding with Ferrari in Palm Springs?

Mr. MacInnis: Yes.

Mr. Davis: Oh, no, I could not stipulate to that.

The Court: Have you got him here?

Mr. MacInnis: He is supposed to be here, your Honor. I would prefer, in view of your Honor's suggestion, that I speak personally with Mr. MacDonald before subjecting him to any questions.

The Court: Do you want to take a recess now and try to [85] get in touch with Mr. MacDonald?

Mr. MacInnis: Whatever your Honor suggests.

The Court: We will take a brief recess.

(Recess.)

Mr. MacInnis: Mr. Davis has agreed, your Honor, to stipulate that if he were called to the stand as a witness, Henry Gourdin would testify that upon January 6 of 1946 he was in Palm Springs with the defendant, Renaldo Ferrari, and that the items charged in the particular stable bill

against Ferrari are true and correct representations, particularly as concerns January 6, of a horseback ride which he knows of his own knowledge Ferrari took.

Mr. Davis: I do not think I can go that far. I will stipulate that if he took the stand he would testify that he was in Palm Springs on January 6 with the defendant, but I do not think I can go further and stipulate that this document represents a true account. I could not stipulate to that.

Mr. MacInnis: I do not ask that the stipulation go to the truth of the document, but merely as to what the witness Gourdin would say as to the truth of the document.

Mr. Davis: Yes.

Mr. MacInnis: That is the form of the stipulation.

Mr. Davis: I will stipulate to that.

Mr. MacInnis: The defendant rests.

(Defendant rests.) [86]

Mr. Davis: I would like to call Mr. Grady in rebuttal, your Honor.

WILLIAM H. GRADY

called as a witness on behalf of the Government in rebuttal, and having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Grady, you testified in your direct examination that you were in the premises of the

(Testimony of William H. Grady.)

Star Dust Bar about eight weeks in the months of January and February, is that correct?

A. Yes, sir.

Q. And you have testified particularly in this case that you were there on January 5, 17 and 28, is that correct?

A. Yes, sir.

Q. I am going to show you three pictures offered by the defendants which were taken in May, 1946, and which witnesses for the defendants have stated represent the true condition of the premises in the month of January, 1946, and ask you to examine them and tell us from your own knowledge whether or not those pictures are an accurate representation of the condition as you personally observed them in the month of January, 1946?

A. The picture, Defendants' Exhibit A-4, is a picture depicting a man, the lower portion, about from the pockets down, of a [87] man standing in the room, in the liquor room. It appears as though this picture had been taken through one of the observation places. If this picture was intended to depict the true and entire vision that could be obtained from any of these observation places looking into the liquor room, there have been changes made.

Q. And that picture would not be a true representation of the conditions as of January, when you were there?

A. No, sir.

Mr. MacInnis: I think, your Honor, that the answer must be supplemented, because it is in the form of a conclusion. He says there appears to have

(Testimony of William H. Grady.)

been changes made. I think he should tell us what the changes are to his knowledge.

The Witness: The view as depicted in Defendant's Exhibit 4-A is not complete. It looks as though it is a portion of the view. This picture depicts a portion of the view, but not the entire view.

Q. (By Mr. Davis): That is what you mean when you say there were some changes made?

A. That some changes must have been made, because the picture does not depict a complete view.

Mr. Davis: I will stipulate that the conclusion, "There must have been some changes made," may go out.

Mr. MacInnis: Also that there are some changes made because he is unable to tell us the changes. He draws an [88] inference.

The Court: Counsel just stipulated that that may go out.

Mr. Davis: I just stipulated anything about changes may go out. The answer merely is if that pictures purports to represent the true view, that it does not, because the view is greater than that.

The Witness: If the Defendants' Exhibits A-1 and A-5 represent the view from the inside of the liquor room towards the observation post, they do not represent a true—a true view of the bottles that were on the shelves on January 5, 17 and 28, as I recall the situation at that time.

Q. (By Mr. Davis): Would you say on January 5, 17 and 28, that there were more or fewer

(Testimony of William H. Grady.)

bottles on those shelves in front of the place than appear in these pictures?

A. There were fewer bottles.

Mr. Davis: That is all.

Cross-Examination

By Mr. MacInnis:

Q. Mr. Grady, in the long investigation which you and the other agents conducted from the vantage point which has already been described, you did not make any count of the number of bottles at any particular time, did you? A. No, sir.

Q. I suppose it would be fair to say that there were always some bottles upon those shelves, according to your best memory, [89] would it not?

A. Yes, sir.

Q. In other words, the shelves would never be bare of bottles?

A. In portions they would be bare. These pictures depict a solid wall of bottles.

Q. Showing you the picture No. A-5, which has just been shown to you, there are bare places showing?

A. That is on the lower shelf, Mr. MacInnis. I refer to the upper shelf, this portion where the view above would be.

Q. I appreciate, Mr. Grady, that neither of us are experts in the liquor business, but I suppose you would agree with me that it is common knowledge that rum, which seems to be shown as represented by some of the bottles with the label "Bac-

(Testimony of William H. Grady.)

cardi," and Sherry, represented by the label "Gonzales Sherry," would not be in as rapid currency as bottles of, let us say, ordinary bourbon; that is something you would recognize, isn't that so?

Mr. Davis: I object to that as calling for the conclusion and opinion of the witness, and furthermore, I object on the ground it is incompetent, irrelevant and immaterial. The question is not whether those bottles would move, but whether they happened to be there on that shelf or some other shelf.

Mr. MacInnis: Your Honor, the propriety of the question is established by the fact that the Government attorney cross-examined the defendant upon that subject, and the defendant, [90] without objection from him, gave answers upon the contents of that particular shelf and the reason for the bottles probably remaining constant in number.

The Court: I recall an answer of the defendant on that score. I do not know whether it came out on direct examination or was in direct response to a question, but I think the objection is good. I will sustain it. The answer to that question depends upon so many circumstances that any answer would be purely conjectural and speculative.

Q. (By Mr. MacInnis): I show you Exhibit A-1 for the defendant, which is labeled, "Photo taken directly in front of place." The shelf is 38 inches from the ground. The camera is five feet from peephole." We will agree, will we not, that that shelf contains, so far as can be seen, bottles

(Testimony of William H. Grady.)

of vermouth upon the right hand side and some substance which I think is a type of vermouth also upon the left, is that correct? A. Yes, sir.

Q. So far as can be seen that shelf is filled with bottles of vermouth?

A. I can't place that shelf exactly, Mr. MacInnis. On the lower shelf I recall papers and things like that that were there, although I will say that the majority of the observations that were made, we were concerned more with our observations from the top of the shelf and with the observations [91] underneath. As you can see, it would be impossible for us to make any observations of any value to the Government as evidence by watching a man's feet.

Q. That is precisely the import of these questions, of course, Mr. Grady, from your vantage point you could not, of course, see the labels on the bottles except such bottles as may have been turned in your direction?

A. And such bottles as had labels on the back.

Q. I see, but other than that you could not see the front labels? A. No, sir.

Q. The only changes that you would point out to the court now as appearing to your own memory between the times you made these investigations and the times these pictures were taken were those you have already cited: difference in the position of the bottles?

A. Difference in the number also, the number of bottles on the second shelf.

Q. No matter where the particular peepholes were, upon the occasion of each specific observa-

(Testimony of William H. Grady.)

tion the Agent looking through the hole would have his perspective narrowed by the fact that there were shelves beneath his observation and shelves above his observation; that is true, isn't it?

A. Now, if I follow you, I can't recall whether there were shelves above. There were no shelves above that would interfere [92] with our view. In fact, I could see the ceiling of the liquor room.

Q. From some perspective point?

A. From the different observation posts in there.

Q. Would you be able to see the ceiling and the floor at the same time?

A. Yes, yes. But there would be a portion that would be missing on account of the shelving where you could not be able to see, which would be possibly a foot wide by looking at the floor and the ceiling from the same position.

Q. In other words—I am not going to argue with you as to whether you could see certain things or you could not—but at least the vision was not perfect: there were relative degrees of obstruction at different points formed either by the position of the shelves or by such bottles as were placed upon the shelves.

A. Yes, that is correct.

Q. We agree on that, do we? A. Yes.

Mr. MacInnis: That is all.

The Court: Mr. Grady, is there any doubt in your mind that on January 5, January 7 and January 28 of 1946, you saw this defendant?

A. No, sir.

(Testimony of William H. Grady.)

Q. In this room, and saw him making use of the heroin? [93]

A. No, sir, there isn't any doubt.

Q. Is there any doubt as to your identification at all? A. No, sir.

Mr. MacInnis: May I make an objection, if the Court please? I purposely waited until the question was answered for this reason: the objection I would have made would be, of course, that the Court was asking the witness to make a comment either upon his own credibility or upon the credibility of a co-agent. But it seems to me the implication from the question and the answer goes deeper. Your Honor read, of course, without any intention, the wrong date and the witness nevertheless answered, "No."

The Court: January 5, January 17 and January 28.

Mr. MacInnis: Your Honor asked him concerning the 7th a moment ago and the witness immediately answered in the affirmative.

The Court: You may be right, but my recollection is I said January 5, January 17 and January 28. Maybe I said the 7th.

Mr. MacInnis: What I wish to point out was the witness' eagerness to answer in the negative as to any date.

The Court: I am interested in getting a direct answer from an officer of the United States as to whether there is any doubt in his mind at all

(Testimony of William H. Grady.)

as to the identification of this defendant. In my opinion, it is a perfectly proper question? [94]

Q. What is your answer to the question as to January 5, January 17 and January 28?

A. There isn't any doubt in my mind at all.

Q. (By Mr. MacInnis): Mr. Grady, were you there on the fifth of January? A. Yes, sir.

Q. And the seventeenth? A. Yes, sir.

Q. And the twenty-eighth? A. Yes, sir.

Q. You were there on all of those occasions?

A. Yes, sir.

Mr. Davis: May I ask one other question?

Q. Did you or did you not on each of those occasions or on one or more of them, if that be the case, overhear conversations between this defendant and the people who were in the room with him?

A. Yes, sir.

Q. On all of the occasions?

A. On one occasion, on the occasion of the 28th, I overheard a conversation. It was taken down at that time.

Mr. Davis: That is all.

Mr. MacInnis: No questions.

The Court: I would like to have you recall, if you are not intending to, Agent Hays. I do not know whether you [95] intended to recall him or not.

Mr. Davis: No.

The Court: The Court wishes to ask him a question.

HENRY B. HAYS

recalled as a witness on behalf of the Government and having been previously sworn, testified as follows:

The Court: Mr. Hays, did you say that you were present on all of the three occasions that were mentioned in the indictment, January 5, January 17 and January 28?

A. No, your Honor. I was present on the 17th and the 28th.

Q. On the 17th and 28th? A. Yes, sir.

Q. Is there any doubt in your mind at all as to your identification of this defendant being present in this store room on January 17 and January 28?

Mr. MacInnis: Pardon me. The same objection, your Honor, as previously introduced.

The Witness: Your Honor, I have known this defendant since 1939—

Mr. MacInnis: Now, we ask that that answer be stricken.

The Court: That may go out. I want to know whether there is any doubt in your mind.

The Witness: None whatever.

The Court: Is there any doubt in your mind as having [96] seen him on these two occasions using the narcotic heroin?

Mr. MacInnis: The Court will deem the same objection is raised.

The Witness: There is no doubt.

(Testimony of Henry B. Hays.)

The Court: That is all I have to ask. Just a moment. Maybe Counsel wishes to ask a question.

Mr. MacInnis: I have none.

The Court: Do you intend to recall Mr. McGuire?

Mr. Davis: No, your Honor.

The Court: Let Mr. McGuire take the stand.

THOMAS E. MCGUIRE

recalled as a witness on behalf of the Government, and having been previously sworn, testified as follows:

The Court: Mr. McGuire, I am not sure, but have you testified that you were present on all three occasions, January 5, January 17 and January 28?

A. No, sir, not on the 28th.

Q. You were present on January 15th and January 17th? A. January 5th.

Q. The fifth. What did I say?

The Clerk: You said the fifteenth.

The Court: January 5th and January 17th?

A. That is correct.

Q. Is there any doubt in your mind as to your identification [97] of this defendant being present in that storeroom on January 5th and 17th?

A. I am positive.

Mr. MacInnis: The same objection.

The Court: You may have the same objection.

Q. Is there any doubt in your mind that you

(Testimony of Thomas E. McGuire.)

saw him making use of the narcotic drug in the manner that you have heretofore described on those dates? A. Yes, sir, I did.

Q. There is no doubt in your mind?

A. No doubt whatsoever.

The Court. Any questions?

Mr. MacInnis: No questions.

Mr. Davis: That is all, your Honor.

The Court: Any further evidence?

Mr. MacInnis: No further evidence. I would like to make a motion. The Government rests?

Mr. Davis: Yes, the Government rests.

Mr. MacInnis: In renewing the motions which I made yesterday against the legal sufficiency of the counts lodged against the defendant Ferrari, one question comes to my mind today in a slightly different form, in view of the Court's interest in the positiveness of the recollections of the agents. I wondered why the Court did not ask Agent McGuire why the indictment in this action says that Ferrari committed a certain act upon the fifth of January in connection with Bruno.

The Court: If you want to inquire into that, I will direct the witness to take the stand again. It was not a matter I was interested in. That is why I did not ask him.

Mr. MacInnis: It is not my job to correct conflicts in the Government's evidence.

Mr. Davis: Your Honor, obviously the Agent could not testify. I prepared the indictment. If I put the wrong name in, he does not know why Bruno's name is in, rather than Flier.

(Discussion between the Court and counsel.)

The Court: I haven't the slightest doubt in this case, unless I were to conclude that the testimony of the defendant and of two men who have been convicted already under this very statute, who were both traffickers and addicts, would raise a reasonable doubt in my mind. The defendant in this case elected to waive a jury. He could have tried the case before a jury. He waived it, and that makes me the tryer of the fact, and when I am the tryer of the fact I am going to make my decision according to the same rules that I instruct jurors to render a decision on. In my opinion there is not the slightest reasonable doubt in my mind whatsoever. I could not possibly have any doubt in this case as to the evidence, and accordingly the judgment is that the defendant is adjudged [99] guilty under the three counts of the indictment.

Mr. Davis: Does the Court wish to hear from one of the agents?

The Court: Maybe Counsel wishes to make some motion.

Mr. MacInnis: I wish to make a motion in arrest of judgment as to all three findings heretofore urged, and the motion for dismissal at the end of the Government's case in chief.

The Court: I will deny the motions.

Mr. MacInnis: I wish to make and introduce at this time a motion for a new trial upon the grounds of the insufficiency of the evidence and upon all statutory grounds.

The Court: That motion is submitted, too?

Mr. MacInnis: Yes, your Honor.

The Court: Very well. I will deny that motion.

(Thereupon Mr. Grady was put upon the witness stand to testify as to the background of the defendant.)

(The Court made the following ruling:)

The Court: I will say to you, you have done your job as dilligently in every way as a lawyer should in defending his client, but in my opinion the guilt of the defendant is established beyond a reasonable doubt, and I now have the duty of imposing a judgment in this case. Inasmuch as the defendant is not an addict, there is no point in my considering the case from that point of view. Certainly it is not a case [100] which warrants probation because of the admitted nature of the activities of the defendant, the kind of people he associates with, and his general activities, as well as the conviction of an offense that, while it was not a felony, involved a type of activity not wholly dissimilar from what we have here. So therefore, it would not appear that he could properly be admitted to probation. That being the case, I do not feel that there is anything else that the Court can do except to impose a sentence in this case as required by the statute. I will sentence the defendant to one day in jail and one dollar fine on Count One of the indictment, and I will sentence him to three years imprisonment in the Federal penitentiary and one hundred dollars fine on Count Thirty-nine, and three years imprisonment and one hundred dollars fine on Count Forty of the indictment, all of the sentences to run concurrently. [101]

CERTIFICATE OF REPORTER

I, J. J. Sweeney, Official Reporter, certify that the foregoing 101 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

[Title of District Court and Cause.]

STIPULATION TO CORRECT RECORD

It Is Hereby Stipulated by and between Hallinan, MacInnis and Zamloch and Ralph B. Wertheimer, attorneys for appellant, and Frank J. Hennessy, United States District Attorney, attorney for appellee, that the record on appeal in the above entitled matter may be corrected by the addition thereto, and inclusion therein, of the reporter's transcript for Saturday, April 13, 1946 in the matter of "United States of America vs. Frank Flier" No. 30,073 G.

HALLINAN, MacINNIS &

ZAMLOCH,

RALPH B. WERTHEIMER,

Attorneys for Appellant.

/s/ FRANK J. HENNESSY,

Attorney for Appellee.

It Is Hereby Ordered that pursuant to the above stipulation the record on appeal in the above en-

titled matter shall be corrected by the addition thereto and inclusion therein of the reporter's transcript of Saturday, April 13, 1946 in the matter of "United States of America vs. Frank Flier" No. 30,073 G.

LOUIS E. GOODMAN,
Judge of the United States
District Court.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in this office.

Attest:

[Seal] C. W. CALBREATH,
Clerk, District Court of the U. S. Northern District
of California.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: Filed Oct. 9, 1947.

[Endorsed]: Filed U. S. C. C. A. Oct. 13, 1947.

In the Southern Division of the United States District Court for the Northern District of California.

No. 30449 G

RENALDO FERRARI,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

CLERK'S CERTIFICATE TO REPORTER'S
TRANSCRIPT

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the following Reporter's Transcript was filed on December 31, 1946 in case No. 30073 G, United States of America, vs. Frank Flier, and by Order to Stipulation to Correct Record is herewith forwarded to the United States Circuit Court of Appeals to be considered by it as part of the record on appeal herein, to wit: Case No. 30073 G—U. S. A. vs. Frank Flier. Reporter's Transcript for Saturday, April 13, 1947.

Witness my hand and seal of the District Court of the United States for the Northern District of California, this 13th day of October, 1947.

[Seal]

C. W. CALBREATH,

Clerk,

By /s/ M. E. VAN BUREN,

Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California.

Before: Hon. Louis E. Goodman,
Judge.

No. 30,073 G

UNITED STATES OF AMERICA

vs.

FRANK FLIER,

Defendant.

Counsel Appearing:

For the United States: James T. Davis, Esq.,
Ass't U. S. Atty.

For Defendant: Leslie Gillen, Esq.

Saturday, April 13, 1946

The Clerk: United States vs. Flier.

Mr. Gillen: May it please your Honor, in this matter the defendant Flier was arrested in the City of Salinas at a gasoline service station, and at that time he was seized by two agents and searched, as set forth in the petition for the exclusion of evidence, and we believe that the search and seizure was an unlawful one, and we at this time move that the evidence be suppressed.

Mr. Davis: If your Honor please, we base our right to [1*] make the search on two theories, first of all that the agents had probable cause to make

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

the search and seizure, and, secondly, that they made this search incidental to an arrest, that they had probable cause to make the arrest, and I have produced an agent today to testify as to the background and inform your Honor as to probable cause that they had.

The Court: That is the issue, probable cause?

Mr. Davis: Yes, I will call Mr. Grady.

WILLIAM H. GRADY

called as a witness for the United States; sworn.

Mr. Davis: Mr. Grady, you are an agent of the Federal Bureau of Narcotics, are you not?

A. Yes.

Q. Do you know this defendant, Frank Flier?

A. Yes.

Q. In the interest of saving time, prior to the day of his arrest on March 2, 1946, at Salinas, had you observed him at any previous time in connection with a narcotic transaction? A. Yes.

Q. Will you state to the court what you observed on the first occasion?

A. On August 20, 1945, through an informer, I made a purchase of heroin from the defendant, Flier.

Q. You say you made a purchase of heroin through an informer? A. Yes.

Q. You made the purchase using an informer?

A. Through an informer, the informer under my direction made the purchase. [2]

(Testimony of William H. Grady.)

Mr. Gillen: I move that the answer that through an informer he made the purchase be stricken out as hearsay.

The Court: I will sustain the objection and strike out the answer.

The Witness: On the evening of August 20, 1945, I took an informer to, I drove with an informer to the Star Dust Bar, on Larkin and Sutter Streets. I searched this informer and gave him \$50 of identified currency from the official advance fund. I observed this man enter the Star Dust Bar and approach Flier; Flier was standing in front of the bar; this man and Flier walked back to the rear of the bar, returned shortly, and the man walked down Sutter Street to Polk Street, around the corner of Polk Street, where I met him, and again searched him, and he did not have the \$50 in currency, and he had a bindle of heroin.

Mr. Gillen: I move that the entire answer, the previous answer and this answer be stricken out as hearsay.

The Court: We are dealing with the matter of probable cause and not proof of the criminal act.

Mr. Gillen: I think, however, your Honor will agree with me that there is a gap in the inspector's testimony; he said that he saw the informer enter the bar, or saw him approach the accused, the defendant Flier, he saw the defendant walk to the end of the bar and subsequently saw the informer leave the bar and walk down Sutter Street to the corner, where he [3] searched him. There is a gap there.

(Testimony of William H. Grady.)

Q. Did you have the informer under your surveillance at all times?

A. No. There was a brief period of about two minutes while the informer and Flier were in the rear of the bar where they were not under my surveillance.

Mr. Gillen: I submit that there is a gap.

The Court: Did the informer tell you that he had sold heroin to him? A. Yes.

The Court: That is hearsay but this is probable cause, so that I will allow it.

Mr. Davis: Did anything occur—did you observe the defendant the night before the defendant's arrest on March 2? A. Yes.

Q. Where did you observe him and what occurred at that time?

A. On the night of March 1 I saw the defendant Flier and Ferrera and Bruno in a liquor room in the rear of the Star Dust Bar; I was in a storeroom that was owned by the apartment house at 1112 Larkin Street. After Flier, Ferrara and Bruno entered this room they held a conversation; Bruno said, "Well, what have we got?" And Flier said, "We have got \$2080," and he said, "We have got 3¼ ounces left."

Q. What date was this?

A. March 1, the day before the arrest. Flier then counted the money or shuffled the money through his hand and said, "This will be about \$700 apiece," and I observed him hand the money to Bruno and to Ferrera. [4] Ferrera then left

(Testimony of William H. Grady.)

the liquor room and Bruno said, "I don't suppose I will see you again before you leave," and Flier said no, he said, "I am going down to Los Angeles." He said, "I am going to take the cure." He said, "I can't take the cure around town, because these other fellows I have been running around with are always offering me heroin." Bruno said, "How are you fixed?" And Flier said, "I have money enough, I am going to take enough stuff so I will be comfortable on the ride when I ride down." So at that time they left the liquor storeroom. The next morning Agent Hayes and myself watched Flier, and we observed Flier loading bags in the back of the car, and after driving around town he went on the highway, and we proceeded ahead of him on the highway to approximately between Palo Alto and San Jose, and waited for them, as they drove on down the highway we followed them, and when they stopped in the service station in Salinas we placed the defendant Flier under arrest and removed a package of heroin from his left hand shirt pocket.

Mr. Davis: That is all. We submit the motion.

Cross-Examination

By Mr. Gillen:

Q. Mr. Grady, on the night of August 20 you said that an informer visited the Star Dust Bar. What time of night was that?

A. About 8:30.

Q. What was the name of that informer?

(Testimony of William H. Grady.)

Mr. Davis: I object to that and direct the witness not [5] to answer that on the ground that he does not have to disclose the name of the informer.

The Court: I will sustain the objection.

Mr. Gillen: Was it a man who was acquainted with the defendant Flier, or a woman?

Mr. Davis: I make the same objection.

The Court: The objection is sustained.

Mr. Gillen: You say that you searched the informer? A. Yes.

Q. Did you? A. Yes.

Q. Was it a man or a woman informer?

A. It was a man.

Q. You personally made the search?

A. Yes.

Q. Did you remove all of his clothing?

A. No.

Q. You did not search his body?

A. No, I searched all of his clothing.

Q. You did not search his body? A. No.

Mr. Davis: If your Honor please, I do not like to interrupt but I think we are going very far afield. We only have to show probable cause in the mind of the agent.

Mr. Gillen: Bindles of narcotics have been concealed on the body.

The Court: Even if the narcotic agents were mistaken, even if he did not make a thorough search, the only problem that we are concerned with here is the good faith that arises from what is called Probable cause; even if he made a mistake,

(Testimony of William H. Grady.)

it would not destroy probable cause. Unlawful search and seizure has to do with some unlawful act or something that is beyond the good faith of a public officer. I do not see that it makes any difference whether he took this individual around and had him fluoroscoped to find out whether he had this stuff concealed somewhere.

Mr. Gillen: There is a gap between August 20 and March 1; something happened on August 20th which the agent testified to, a transaction which made him suspicious and gave him probable cause to act upon.

The Court: Did you search the body? I don't know what counsel means by that.

A. I did not search his body. I searched the clothing on his body.

Mr. Gillen: You say you went through his pockets? A. Yes.

Q. You did not remove his clothes?

A. No.

Q. Then you drove with him to this location on Sutter Street, the Star Dust Bar, is that correct?

A. Yes.

Q. And you say you saw him enter the bar?

A. Yes.

Q. Where were you?

A. I was about fifteen feet behind him; as he walked to the bar, the bar was open and I stood in the entrance to the bar.

Q. Now, from the time that he entered the bar, you being fifteen feet behind him, he was out of your sight?

(Testimony of William H. Grady.)

A. No, I don't think he was. I was ten or fifteen feet behind him as he walked to [7] the bar, and I walked immediately up.

Q. As he turned into the bar off the street, while he was in the street, he was in your sight?

A. Yes.

Q. When he turned into the bar you were still ten or fifteen feet behind him, is that correct?

A. I think, counsel, you will find that you walk faster on the street than you do as you enter a bar.

Q. I am asking if when he turned into the bar and you were still ten or fifteen feet behind him, you lost sight of him, did you not? A. No.

Q. You never did lose sight of him momentarily while he entered the bar while you were on the street ten or fifteen feet behind him?

A. I can see your point, you are placing me fifteen feet behind him.

Q. I am only placing you fifteen feet behind him because that is what you said.

A. As he approached the bar I was fifteen feet behind from there.

Q. From what angle did he approach the bar?

A. He approached the bar from Larkin Street.

Q. In other words, he had to walk in an easterly direction, is that correct, on Sutter Street and turn right to the bar?

A. Yes, I believe that is correct.

Q. In other words, he walked on Larkin Street and made a right hand turn into the bar?

A. I am not familiar with directions up there. On Larkin Street he was walking east [8] from Bush, coming down from Bush.

(Testimony of William H. Grady.)

The Court: You are mistaken, the blocks run approximately north and south.

A. Then if Larkin runs north and south, he was walking from Bush Street toward Sutter; that would be south.

Mr. Gillen: And the Star Dust is where with respect to the corner of Larkin?

A. The door is probably about fifteen feet from the corner.

Q. Fifteen feet to the easterly corner of Larkin Street? A. Yes.

Q. Where were you walking?

A. I was walking on the sidewalk behind the man.

Q. On the same side of the street?

A. Yes.

Q. Did you observe how many people were in the bar at the time that the informer entered?

A. I didn't pay special attention to the other people in the bar. There are two rooms in this bar and I could not say how many were in the other part of the bar, but in the part where my informer was there were about, I would say, perhaps five or eight people.

Q. And the defendant Flier was behind the bar?

A. No, the defendant Flier was out where the people were; he was not working behind the bar.

Q. In other words, the defendant Flier was standing at the patrons' side of the bar, outside of the bar? A. Yes.

Q. Was he commingling with the five or eight people that you [9] observed there?

(Testimony of William H. Grady.)

A. No, not exactly commingling with them; he was standing there, I believe that he was standing there.

Q. Talking to some people?

A. Yes, I believe he was talking to some people at the bar.

Q. At the time the informer passed over the threshold of the bar how far would you say you were behind him?

A. I would say that I was probably eight or ten feet.

Q. About eight or ten feet behind him?

A. Not behind him, on the side; as the informer turned to walk in the door of the bar I walked from the outside of the sidewalk to the door of the bar.

Q. Were you in a position of having a full view of the bar at all times, the interior of the bar at all times as you approached the bar?

A. No, I could see the informer; I couldn't see the bar.

Q. Could you see the entire interior of the place?

A. No.

Q. You couldn't? A. No.

Q. It was not until you got right in front of the door of the bar that you could see the interior and he was there, isn't that true?

A. I was not really interested in the interior of the bar; I was interested in the informer and the defendant Flier.

Q. But you would have to see the interior of the bar in order to keep the informer in sight?

A. Not all of the bar.

(Testimony of William H. Grady.)

Q. Not all of the bar, but you would have to see the interior; [10] I am asking you if you had a full view of the interior at all times from the time the informer entered.

A. You mean could I see the entire floor surface of the bar?

Q. The interior, where Flier and the informer were standing.

A. I could see the informer and Flier, if that is your idea. I could see the informer at all time except the period of time that they walked into the rear; when they went to the rear they were out of my view.

Q. When they went to the rear you lost complete sight of them?

A. I lost complete sight of them.

Q. There were other people standing between you and the informer and Flier, is that correct?

A. No; they went through a door.

Q. They went through a door? A. Yes.

Q. And out of your sight?

A. Out of my sight.

Q. Did you have an opportunity to observe who was in the room into which the informer and Flier went out of your sight? A. No.

Q. You did not? A. No.

Q. You attempted to gauge the amount of time that the informer was out of sight? A. Yes.

Q. You said it was, I believe, two minutes?

A. About two minutes.

(Testimony of William H. Grady.)

Q. Did you time it with your watch.

A. No.

Q. That is merely your guess?

A. That is right.

Q. It might have been a longer time?

A. It might have been shorter. [11]

Q. It might have been shorter? A. Yes.

Q. It might have been longer?

A. It might have been longer.

Q. That is your recollection now of how long that was on August 20, 1945?

A. My recollection of the time, that is the best I can recall it.

Q. You did not see the defendant Flier pass any contraband of any kind to the informer?

A. No.

Q. It did not come to your attention that the identified currency which was given the informer was ever in the possession of Flier, is that correct?

A. That is correct.

Q. That was never established by you?

A. No.

Q. So that all you were going on at that time to establish probable cause was hearsay as to whom he gave the money, the identified money, and from whom he received the contraband, is that correct?

A. The informer said that he went in the liquor room and returned with a couple of bindles of heroin, and asked him how much he wanted, and he said he only wanted one.

(Testimony of William H. Grady.)

Q. You say on March 1 you had hidden yourself in a room behind the Star Dust Bar, is that correct? A. Yes.

Q. Were you alone at that time? A. Yes.

Q. About what time of night was this?

A. About 8:50.

Q. 8:50 at night? A. Yes.

Q. Did I understand your testimony to be that you saw Flier, Brunow and Ferrera?

A. I did. [12]

Q. In the rear room of the Star Dust Bar?

A. Yes, I did.

Q. You were in another room than that rear room, were you not? A. Yes.

Q. You were not in the same room that the defendant and the other men that you have mentioned were? A. That is right.

Q. You say you saw them. How did you see them?

A. I saw them in an opening in the wall; there were three or four openings in the wall there about $3\frac{1}{2} \times 7$ inches, and I was looking through those openings.

Q. Is that a wooden wall or a plastered wall?

A. The top part is a plastered wall, the bottom part is a wooden wall with sort of chicken wire over it.

Q. Did you make those openings in the wall?

A. Those openings were made in the wall originally, I believe two of those openings had small boards nailed over them from the side of the room

(Testimony of William H. Grady.)

that I was in, and I removed the two boards and the openings between them originally were there at the time.

Q. And the agents bored holes in the wall?

A. There were no holes bored. On two of them there were boards that had been nailed over, and in building the wall it appeared that they had short boards that had not come together, and it left an opening where the boards were about seven inches apart.

Q. Slats?

A. No, not slats, openings where the boards, 3½ inches wide, came up so far—it looked to me as if when the man was building the place the boards came up so far [13] and then the other piece of board—that he did not have any length board to fit it so he put another board in there, and it happened to be several inches short.

Q. You removed those boards?

A. No. Then in a few places in the building they took little pieces of boards that appeared to be, I would say, probably off of the top of apple boxes, boards of that type that were tacked over the top of those two holes; two of those holes did not have anything over them.

Q. Two of those holes you say were just open, nothing had been done to cover them up?

A. Yes.

Q. And the other two had boxwood or some material of that kind over them and you took those off?

A. Yes.

(Testimony of William H. Grady.)

Q. Did you do that while you were making your observation that you have described here now?

A. Oh, no, we saw the defendant, I saw the defendant and heard his conversation over the period of approximately two minutes.

Q. My question was, did that occur while you were making your observation, the removal of the boards? A. No.

Q. They had been removed previously, is that correct? A. Yes.

Q. At some prior time? A. Yes.

Q. You say that at that time you were in a position to observe the defendant and the other two men you have mentioned? A. Yes.

Q. Were you in a position to hear their conversation without [14] the aid of any listening device?

A. Yes.

Q. You did not have a Dictaphone?

A. I did not use a Dictaphone at that time.

Q. How far away were you from the men that you heard talking, the defendant and the other two men? A. Possibly six feet.

Q. You were on the other side of the wall six feet away?

A. Not six feet from where I was standing—the defendants were standing between four and six feet, I would say.

Q. Between four and six feet? A. Yes.

Q. Were you able to make your observations from one opening, or did you have to move from one to the other?

A. I moved, I used two different openings.

(Testimony of William H. Grady.)

Q. Now, you testified that the morning following what you did on March 1st you and another agent placed the defendant Flier under observation from the time he left his home, is that correct?

A. Yes.

Q. You saw him load his car with baggage or luggage and start out with his wife for presumably Los Angeles, is that right?

A. Yes. We observed him in the morning about 7:30; he got in the car and he and his wife went out to the Stanford Hospital, returned to the house, and shortly thereafter they came down and loaded the baggage into the car and then after that we followed them down to the Pacific Gas & Electric Company, over toward North Beach, where they passed from my view, we got caught in the traffic, and then we went out on the highway [15] and waited for them to come along.

Q. What point on the highway?

A. We did not stop at any one point for any length of time, we went down to Palo Alto, we stopped at Palo Alto for a while, and then rode leisurely along the highway, and when the defendant passed us we then followed him.

Q. At what distance did you keep them under observation, if you did, between the point where you picked them up on the highway and Salinas?

A. Well, I think we followed, we did not have any special distance, we did not pass them, or anything like that.

(Testimony of William H. Grady.)

Q. Let me put it this way, maybe my question was not clear: At what point did you and your partner pick up the Flier car and again have them under observation on the highway?

A. Well, the observation was in the vicinity of San Jose.

Q. In the vicinity of San Jose? A. Yes.

Q. Did you then follow the car? A. Yes.

Q. You followed it from San Jose to Salinas?

A. Yes.

Q. At Salinas the defendant was walking across the property of the service station at the time the arrest was made, is that correct?

A. No, that is not correct.

Q. What is correct.

A. As we drove into the service station the defendant was still in his car, and the defendant, as I left our car, had not left his car yet; I was about fifteen feet from the door of the defendant's car, and as I walked over to him he left his car and he was standing on the running [16] board of the car, and as I approached him he stepped out of the car and closed the door, and at that time I placed him under arrest.

Q. In what manner did you place him under arrest?

A. I took my handcuffs out and put the handcuffs on him, and I told Flier he was under arrest, and I led him over to our car, which was about fifteen feet away, and there made a preliminary search, and found this heroin, package of heroin, in the left-hand shirt pocket.

(Testimony of William H. Grady.)

Q. Is that all of the contraband that you found, either on the person of the defendant or in any of his luggage, or in the car, at all?

A. Yes, that is all.

Q. Wasn't your conversation there at the time that the search was made with relation to something that was put into the defendant's pocket by one of you agents?

A. No; I said, "How did this stuff get here?" And he said, "Well, I don't know." So I said, "Do you think we put it there?" And he said, "No, some of the people that I have been running around with probably put it in there, I don't know how it got there, but I don't think you put it there."

Q. The arrest was made, as I understand it, when the defendant was standing out on the ground in the service station and you pounced on him and immediately put your handcuffs on him without making any announcement of any kind, is that correct?

A. No. [17]

Q. What is correct?

A. I told the defendant we were Federal officers.

Q. You told him that after you had handcuffed him, isn't that correct?

A. No, we approached him and told him we were Federal officers and put the handcuffs on him.

Q. You told him you were Federal officers before you laid hands on him at all?

A. At the time that we were putting handcuffs

(Testimony of William H. Grady.)

on him; we did not announce our identity before, although we had reason to believe that the man knew who we were, anyway.

Q. How far were you behind this car as the defendant entered the City of Salinas?

A. I would say possibly 150 feet, varying possibly 50 feet each way.

Q. You had heard him say the night before, as you have testified, that he was on his way to Los Angeles to take the cure? A. Yes.

Mr. Gillen: I think that is all.

Mr. Davis: That is all. I submit the motion.

The Court: Have you any evidence to submit in support of the petition?

Mr. Gillen: No, but I believe that the showing of the Government here falls far short of showing possible cause for making the arrest and making the search and seizure. I believe that the arrest was incidental to search and seizure and not the search and seizure incidental to the arrest.

I submit the motion.

The Court: The motion will be denied. [18]

CERTIFICATE OF REPORTER

I, Edward W. Lehner, Official Reporter, certify that the foregoing 15 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

[Endorsed]: No. 11656. United States Circuit Court of Appeals for the Ninth Circuit. Renaldo Ferrari, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 18, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

At a Stated Term, to wit: The October Term 1946, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the first day of August, in the year of our Lord one thousand nine hundred and forty-seven.

Present: Honorable Francis A. Garrecht,
Senior Circuit Judge, Presiding,
Honorable William Healy, Circuit Judge,
Honorable William E. Orr, Circuit Judge.

No. 11656

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SETTING ASIDE DEFAULT OF APPELLANT, AND EXTENDING TIME TO FILE TRANSCRIPT OF RECORD

Upon consideration of the motion of appellant, and stipulation of Mr. Frank J. Hennessy, United States Attorney, counsel for appellee, and good cause therefor appearing,

It Is Ordered that the default of the appellant in failing to file his record on appeal within forty

days from filing of notice of appeal be, and the same is hereby set aside and the appellant may have to and including August 18, 1947, within which to file the certified transcript of record on appeal herein.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11656

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

DESIGNATION OF THE PORTIONS OF THE
RECORD DESIRED TO BE PRINTED
AND STATEMENT OF POINTS UPON
WHICH THE APPELLANT INTENDS TO
RELY UPON APPEAL

The appellant desires that all of the record herein be printed save and except the exhibits herein.

Statement of Points Upon Which Appellant
Intends to Rely on Appeal

Appellant intends to rely upon the following points upon appeal:

(1) That the evidence was insufficient to support the respective allegations in the indictment, and hence, insufficient to sustain any verdict or judgment against said Renaldo Ferrari.

(2) That there was a fair variance between the allegation in the first count of said indictment and the evidence introduced thereon.

(3) That the trial judge, Honorable Louis E. Goodman, upon April 22, 1947, heard and received evidence of and concerning defendant Renaldo Ferrari, in another cause, to wit: The United States of America, plaintiff, vs. Frank Flier, bearing the same title and number, during a proceeding had after an entry of a plea of guilt by said Frank Flier at a time when said Renaldo Ferrari was not present nor given an opportunity to cross-examine; nor was said testimony, as so rendered in the matter of Frank Flier, repeated in the case in chief against Renaldo Ferrari.

(4) No evidence whatsoever was submitted in support of that phase of the respective count, reading as follows: “* * * Said heroin had been carried into the United States of America contrary to law, as said defendants then and there knew.”

HALLINAN, MacINNIS &
ZAMLOCH,

/s/ RALPH B. WERTHEIMER,
Attorneys for Appellant.

Receipt of a copy of within document Admitted
this 9th day of October, 1947.

/s/ FRANK J. HENNESSY,
Attorney for Appellee.

[Endorsed]: Filed Oct. 9, 1947.

No. 11656

United States
Circuit Court of Appeals
For the Ninth Circuit.

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
JAN 28 1948

PAUL R. O'BRIEN,
CLERK

No. 11656

United States
Circuit Court of Appeals

For the Ninth Circuit.

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
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Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11656

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION TO AUGMENT RECORD

It Is Hereby Stipulated by and between Hallinan, MacInnis & Zamlock and Ralph B. Wertheimer, attorneys for appellant, and Frank J. Hennessy, United States District Attorney, attorney for appellee, that the record on appeal in the above entitled matter may be corrected by the addition thereto and inclusion therein of the reporter's transcript for April 22, 1947, in the matter of "United States of America vs. Frank Flier," number 30073-G, in the Southern Division of the United States District Court for the Northern District of California, said transcript being concerned with the proceedings at the time of sentencing said Frank Flier.

HALLINAN, MacINNIS &
ZAMLOCK,

/s/ RALPH B. WERTHEIMER,
Attorneys for Appellant.

/s/ FRANK J. HENNESSY,

/s/ W. E. LICKING,

Attorneys for Appellee.

It Is Hereby Ordered that pursuant to the above stipulation the record on appeal in the above entitled matter shall be augmented by the addition thereto and inclusion therein of the reporter's transcript of April 22, 1947, in the matter of "United States of America vs. Frank Flier," number 30073-G, in the Southern Division of the United States District Court for the Northern District of California.

/s/ FRANCIS A. GARRECHT,
Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 12, 1947.

In the Southern Division of the United States
District Court in and for the Northern District
of California

No. 30,073-G

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK FLIER,

Defendant.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Appearances:

James T. Davis, Esq., Assistant United States Attorney, for Plaintiff.

Leslie Gillen, Esq., for Defendant. [1*]

*Page numbers appearing at top of page of Reporter's Certified Transcript of Record.

Tuesday, April 22, 1947, 4:25 o'Clock P.M.

The Clerk: This matter is on for trial, Mr. Gillen. As I understand, the defendant is going to change his plea?

Mr. Gillen: Yes, at this time, if your Honor please, the defendant requests the Court to withdraw his plea of not guilty to the five counts of the indictment and offers at this time to enter a plea of guilty to the fifth count of the indictment.

Mr. Davis: That is agreeable to the Government, your Honor.

The Court: You are satisfied to have the other counts dismissed?

Mr. Davis: Yes, your Honor.

The Court: The first four counts will be dismissed, then.

Mr. Davis: Yes, your Honor.

The Court: That will be the order. The plea is guilty to the fifth count?

The Defendant: Yes.

The Court: I had better hear some evidence about this matter.

WILLIAM H. GRADY

called as a witness on behalf of the Government; and having [2] been first duly sworn, testified as follows:

The Clerk: State your name to the Court.

A. William H. Grady.

(Testimony of William H. Grady.)

Direct Examination

By Mr. Davis:

Q. Mr. Grady, you are an agent of the Federal Bureau of Narcotics, are you not?

A. Yes, sir.

Q. You are familiar with the facts alleged in this indictment? A. Yes, sir.

Q. Will you state them to the Court?

A. The defendant was charged with the sale of one dram of heroin for \$50. The purchase price of \$50 was paid on August 20, 1945. On June 26, 1945, there was another purchase of two drams of heroin made from Frank Flier together for \$100.

The defendant was arrested in Salinas, California, in the possession of five drams of heroin on March 3, 1946. Mr. Flier is an addict. We have received information that he has been involved in the narcotic traffic for the past several years, first in the Vagabond Club and later in the Star Dust Bar. At the time he was in the Vagabond Club he was associated with Renaldo Ferrari, Stanley Paliwoda, Walter de Argorio and several other people who are known to our office as narcotic violators.

During the time of our investigation at the Star Dust [3] Bar Flier actually sold more narcotics than any of the other people there. However, from our observation it is believed that Bruno was the boss. Bruno was the man that had the final say, although his authority did not enter into each and every transaction. Flier was the man who took all the chances, and he would sell narcotics as many as

(Testimony of William H. Grady.)

five or six times in a single day in small quantities.

He is married. He lives in San Francisco with his wife. He does not have any children. As to his employment records, he had a filling station out at Steiner and Geary. He was more or less involved in black market operations in gasoline, sugar stamps and a few things of that type during the war. Then he sold the filling station or it changed hands, and then he entered the Star Dust Bar as a sort of head man. He was the manager when Bruno was not there. I do not believe that he worked there as a bartender. He may have, however, some of the time, but to my knowledge he was employed more or less as a greeter around the bar. He would stand around the bar and greet people as they came and went.

His criminal record indicates that he was arrested in 1928—according to the Federal Bureau of Investigation records he was arrested in 1928 for safe burglary. It does not show a disposition here on that.

Again in 1931 he was arrested in Los Angeles on one count of robbery. That was later changed to robbery in the [4] first degree, from which he was sentenced five years to life in San Quentin.

Then he was arrested in 1937 in Kansas City. That was violation of the Internal Revenue laws. There appears to be from the record two charges there, and on both of these charges he was sentenced to eighteen months on one, and one year and a day on the other, those running concurrently. That was

(Testimony of William H. Grady.)

1937. That is the last criminal record that he has. The Commanding General, Service of Supplies, Frank Flier, application for laborer in 1942.

The Court: I suppose applications made for work in government agencies come to the Bureau.

Q. Does it appear what sentence was served on that state charge?

A. Five years to life? That was 1931. He was arrested again in 1937 in Kansas City.

Q. You do not know exactly what his sentence was fixed at?

A. California has the indeterminate law.

Mr. Gillen: Three years and eight months, your Honor.

Q. (By Mr. Davis): Mr. Grady, may I ask you in view of your testimony in the Bruno and Billeci cases, when the Court was interested in the degree of culpability of these three defendants, and I believe you stated in both the Bruno and Billeci cases that in your opinion Bruno and Billeci were the ringleaders in the sense that they were the ones that [5] went down to Mexico and bought the narcotics and brought it here—is that correct?

A. Yes, sir, that is right.

Q. And Flier was more in the capacity of working for them, is that correct, in making the sales in the bar?

A. No, Flier handled the resale of it on this end, although Bruno was actually in charge of the over-all operation; Flier was the man that sold the narcotic—he was the man who actually sold the narcotic.

(Testimony of William H. Grady.)

The Court: Who was the retailer?

The Witness: He was the retailer.

Q. (By Mr. Davis): And was it Bruno and Billeci who imported it?

A. Yes, Bruno and Billeci.

The Court: Do you wish to ask any questions?

Mr. Gillen: Yes, your Honor.

Cross-Examination

By Mr. Gillen:

Q. Mr. Grady, did you make any inquiry as to the working record of Flier since his release in 1937 or 1938?

A. No, except that the time I have known him, when he worked in Vagabond Bar and the filling station out at Steiner and Geary—I have seen him out there quite often.

Q. It is true, is it not, that he was never arrested in connection with any black market gasoline stamps or sugar [6] stamps?

A. Well, I believe that is true. There isn't any indication of it on the record.

Q. Anything that you said about his activity in black market gasoline or sugar stamps was based purely upon some hearsay that you may have received?

A. Well, on some conversations that I overheard the defendant making.

Q. Some conversations of the defendant?

A. Yes.

(Testimony of William H. Grady.)

Q. But there is no record that his activities, if there were any activities, ever reached the point where he was ever arrested? A. No, sir.

Q. In fact, his last encounter with the criminal law prior to the arrest that you and Mr. Hayes made was the Internal Revenue violations in Kansas City in 1937, is that correct?

A. That is correct.

Q. And that pertained to the use or possession of some unlicensed alcohol, isn't that correct?

A. Well, there appears in this record to be two charges, Mr. Gillen. It is a violation of the Internal Revenue laws. It says, "Internal Revenue liquor laws." It was evidently a Federal offense.

Q. I understand that, but it pertained to liquor, did it not? [7] A. Yes.

Q. Not narcotics?

A. No, it was not a narcotic violation. It pertained to the liquor laws.

Q. It pertained to liquor that did not have the proper stamps or it did not go through the proper legal processes, is that correct?

A. Some Federal violation of the liquor laws.

Q. In your investigation of Frank Flier did it come to your attention that following his release from the 1937 conviction in Kansas City under the Internal Revenue laws that he had worked through the war in various defense plants? Did that come to your attention?

A. Let me see. I am just trying to recall the first time that I saw Mr. Flier. It seems to me in

(Testimony of William H. Grady.)

1944 that he was over—in 1943 or 1944 he was working in the Vagabond Bar with Ike, Red Ferrari and that group.

Q. In that bar he was a bartender, was he not, working on a salary? Isn't that true?

A. That is what I assume.

Q. Isn't it true at the Star Dust Bar he was also a bartender and manager in the absence of Bruno and worked as a bartender on a salary?

A. I saw Flier many, many times—understand, during the months of January and February of 1946, and during that time [8] I don't believe—I can't recall any incidents of where he wore a bartender's apron or any clothes to work.

Q. Don't you know of your own knowledge he worked as a bartender, that he had a social security card and was in the Bartenders' Union?

A. At the Star Dust?

Q. At both places?

A. I know he did at the Vagabond. I do not know at the Star Dust, but he could have.

Q. My question was, did your investigation reveal to you that he had been employed over a period of years throughout the war working with his hands in various defense plants, shipyards?

A. No, I did not make such an investigation.

Q. Did it come to your attention that he had worked at the shipyards at Wilmington, Delaware, and also in the shipyard at Kansas City, and in Fort Leonard Wood?

(Testimony of William H. Grady.)

A. No, sir, he could very well have, but I wouldn't have known it.

Q. That in his three defense plant jobs he worked a total of four years during the period of the war?

A. He was out here in 1943. How could he be back there working in a defense plant?

Q. I am asking if it came to your attention that he worked during the war for a period of four years in three different [9] defense plants.

A. No, sir.

Q. You did not uncover that in your investigation at all?

A. No, sir, I did not determine that.

Q. You say he is married, is that correct?

A. Yes, sir.

Q. And it came to your attention he has been legitimately married for eleven years to the same woman and has lived with the same woman, is that correct?

A. Yes, sir.

Q. At the service station on Steiner Street he worked as a regular service station attendant filling and servicing automobiles, is that correct?

A. Yes, he operated the station.

Q. He worked with his hands and got dirty and greasy and did the regular things that service station attendants do, is that correct?

A. Yes, I believe that is right.

Q. You stated, did you not, that as between Billeci, who was before this Court the other day, and Bruno, that Flier was the man who was the

(Testimony of William H. Grady.)

least culpable of the three from the standpoint of the Narcotics Division, is that correct?

A. The thing that I would say, Mr. Gillen, is Bruno and Billeci were the smugglers in this case and that Flier was the retail man on this end, that he sold the narcotics here [10] in San Francisco.

Q. I believe you stated that it came to your attention that Flier was an addict. A. Yes.

Q. Did it come to your attention in what manner Flier acquired the addition to narcotics?

A. No.

Q. Did it come to your attention that Flier was shot in the head in 1931 and hovered between life and death for some length of time, and subsequent to that time has complained of the old head injury and in that way became addicted to the use of narcotics for relief from pain?

A. My information is that Flier did not become an addict until he started running around with the crowd down at the Vagabond and the Star Dust Bar. Previous to that time, from everything I can understand, he associated with a different type of people.

Q. It never came to your attention that he developed an addiction in a minor way in the use of narcotics as a result of his old head injuries?

A. I just do not think there is a degree of addiction, Mr. Gillen. Either you are addicted or you are not.

Q. I am not asking you for your opinion as an expert, Mr. Grady; I am asking you what you en-

(Testimony of William H. Grady.)

countered in the way of information in the course of your investigation of this man? [11]

A. In the course of my investigation I would say the man was an addict, Mr. Gillen.

Q. But as to the manner in which he first commenced using narcotics, you have no information?

A. No, sir.

Q. You never heard it referred to as being in connection with migraine headaches which were the aftermath of the pistol wound in the head that doctors could do nothing for him about?

A. No, sir.

Q. You never heard that. Count five in the indictment refers to the incident of the arrest at Gilroy of Mr. Flier by yourself and Mr. Hayes, is that correct? A. That is at Salinas.

Q. At Salinas, rather. On that occasion he was carrying in his pocket one bindle of heroin, is that true? A. Yes, sir.

Q. The grainage or the amount that you described here to the Court was all contained in one bindle, is that so? A. That is right.

Q. And that is an amount that you not infrequently find on the person of a user for his own use, is that correct? A. Yes, that is right.

Mr. Gillen: I think that is all.

The Court: Is there anything that the Government wishes to add? [12]

Mr. Davis: No, your Honor. I think Mr. Grady has made a complete statement of our position.

(Testimony of William H. Grady.)

The Court: I have some recollection of hearing in the case of either Bruno or Billeci some statement made that there was equal culpability between Bruno and Billeci in the point of view of the Narcotics Bureau, but there was nothing said as to the relationship between this defendant and the other two, except what the agent said just now, describing their activities, Bruno being the general leader and Bruno and Billeci being the importers and gatherers of the narcotics, and this defendant acting as a sort of retail salesman, as it were.

Mr. Davis: That was the impression I received. May I ask Mr. Grady another question? It might clarify it. Will you take the stand, Mr. Grady?

Q. Could you tell us, Mr. Grady, from your experience up there in the Star Dust and in overhearing all these conversations and observing the narcotic transactions, do you have any opinion or any knowledge as to the profit motive in this? Was Flier sharing equally in the profit or was he working as a salesman for Bruno and Billeci, do you know?

A. The only thing that I can recall to mind right now is that the night before Flier was arrested they were dividing up the profits. There was Ferrari and Bruno and Billeci—or Flier, Bruno and Ferrari—and they divided the money [13] equally on that occasion, although that was not a very large deal. That was only \$2,100. And these fellows do make a lot of side deals. Somebody would come to town with narcotics to sell them cheap, and

(Testimony of William H. Grady.)

these fellows would buy them up. I do not know whether that is the regular deal they made all the time. But on that occasion they all divided equally, and from my observation up there I never had occasion, outside of that one, to see how they did divide the money, but on that occasion they did divide it equally.

Q. (By Mr. Davis): We have shown, so far as you know, Bruno and Billeci smuggled it out or brought it into San Francisco, is that correct?

A. Yes, sir.

Q. And then you said this man acted as a salesman; he would be evidently working in conjunction with Bruno and Billeci, is that correct?

A. Billeci would seem to leave the picture until he came into San Francisco. Bruno and Flier would then take over. They would take over—there was much work connected with the selling and smuggling of narcotics. When they got it into San Francisco, the first thing they had to do was hide it in some place. So it would be in a secret place. They used the Lake Merced area out there, hiding it underground in glass bottles. They would also have to adulterate it. And we have even heard Bruno and Flier discussing the [14] adulteration or the hiding of the narcotics, that they would have to take the narcotics out and hide them, or they would adulterate them in such and such a proportion.

Q. I take it you understand what we are trying to get at: whether these men are equally guilty or whether Bruno and Billeci were higher-ups and

(Testimony of William H. Grady.)

this man was working with them, and from your testimony, I take it that you have described to the best of your ability what you saw and heard, but you yourself have formed no definite opinion, is that correct?

A. Yes, that is correct. I have given the facts as I have seen them, as best I could.

Q. (By Mr. Gillen): When you mentioned the one isolated instance of seeing or overhearing the division of some money, whom did you say was present?

A. Red Ferrari, Flier and Bruno.

Q. Was it definitely established in your mind from anything that you heard said there that this was pertaining to a narcotic transaction?

A. Yes, sir. There was a discussion as to the quantity of narcotics. The entire discussion was about narcotics, and the money was divided in such a way it was obvious that it was a narcotic transaction.

Q. When you say it was obvious, was that a conclusion of yours, or was it actually said?

A. He did not say, "This is your share of the money for the [15] heroin I sold yesterday," he did not say it that way as he handed the money out, but he said, "This is what we have and we are going to divide it equally." He said, "We sold two ounces to Chino—" I can't recall the exact conversation, but it was a conversation that I knew was about the selling of narcotic drugs.

Q. Ferrari was the third person?

A. Ferrari was the third person.

(Testimony of William H. Grady.)

Q. You are positive that there was no other transaction mentioned other than narcotics from which these funds may have been derived?

A. No, sir, there wasn't any other subject mentioned.

Mr. Davis: Perhaps this would be helpful——

Mr. Gillen: I beg your pardon.

Q. Isn't it true that on this occasion there was a discussion without the transfer of any money?

A. No, I actually saw the money.

Q. You actually saw the money transferred?

A. I actually saw the money.

Q. Was it currency that was transferred?

A. Yes, sir.

Q. Were they large bills or small denomination bills?

A. I couldn't say as to the exact denomination of the bills. Flier divided them into three different parts.

Q. Flier divided it among the three of them?

A. Yes, Flier had the money, but, as I say, that might have been—that might not have been one of their regular transactions. I wouldn't want to leave the impression with the Court that they divided everything that way. I do know that they did on that occasion, but that may have been a side deal where somebody had brought in narcotics, they bought it at a good price, sold it and were splitting the profit between the three of them.

Q. You know, do you not, Mr. Grady, from your investigation, Flier was not declared in on any

(Testimony of William H. Grady.)

equal basis with Bruno and Billeci, and the reason that Flier encountered so much narcotics was that he was the man who worked in the place and the others worked on the outside?

A. The only way I could go about that is the normal relationship between a peddler and distributor.

Q. May I interrupt you? I am asking you if it is not a fact that you know from your investigation, from having listened in, the reason Flier was exposed to so many encounters with people seeking narcotics was that he working in the place, and you know of your own knowledge that Flier was not getting an equal share, that Flier was more of a stooge and handled transactions that he encountered when he was working in the Star Dust Bar when the others were not around?

A. No, I could not honestly say that, because Flier dealt many times when I knew Bruno had been in and out of the place. [17] I do not believe that would be the exact truth of the case.

Q. You did mention in the Bruno case to his Honor when you were asked for an opinion that you considered Flier the least culpable of the three because the other two seemed to be the wholesalers and procurers and Flier merely handled the retail transactions in San Francisco and had no part in the smuggling?

A. My recollection is I told the Court that I believed that Bruno was the boss, and I still maintain that is what I believe: he was the head man.

Mr. Gillen: I think that is all.

Mr. Davis: That is all.

Mr. Gillen: Unless your Honor would care to hear from the defendant—

The Court: I will take whatever statement you want to make.

Mr. Gillen: May I say this: this defendant's first encounter with the law in Los Angeles was when he was a very young man in connection with a robbery case, in which he was shot and nearly killed. Subsequent to that time his working record has been a really good working record. I mean the man has not been afraid to work. The man has worked. His encounter in 1937 was in connection with the use and sale of some unauthorized liquor, that is, liquor that had not gone through the legal processes required by the Federal Government. In other words, it was a type of bootlegging. [18]

The Court: This shooting took place in connection with the robbery for which he served time in Los Angeles?

Mr. Gillen: Yes, your Honor. He was shot by the police. Some young boys were shot by the police in connection with a robbery. This man was shot through the skull, his brain injured, and as an aftermath of that he has suffered through the years at times what doctors call, for want of greater knowledge on the subject, migraine headaches, for which he can receive no relief. As a result of that, during the times he has suffered he did resort to narcotics for relief.

Eleven years ago he married a legitimate girl. I mean, this man is not tied up with any prostitute. He married a fine young woman. She was a working girl herself, a girl of Italian descent. This man is of Jewish descent. They have lived together for the past eleven years. Throughout the war he worked with his hands, I mean, worked at manual labor in three different defense plants, and his record may be found in that respect. From time to time he has worked as a bartender. He is a member of the Bartenders' Union. He had this filling station at Steiner Street, and regardless of the gossip about black market stamps, and I imagine during the war practically every legitimate filling station man did some minor black marketing among his customers, friends and people who were jammed and needed extra gasoline——

The Court: I am not concerned with this gas station [19] business.

Mr. Gillen: Those matters were brought to your Honor's attention. There was a statement made to your Honor—I did not hear it, but it was brought to me second hand—a statement made in court that there was less culpability indicated on this man's part, although he was not selling groceries or a legitimate commodity, than the other men involved here.

The Court: I tried to get that clear. Apparently the Agent explained today all he knows factually about the matter.

Mr. Gillen: There was not an equal share of the profits, may it please your Honor. As a matter of

fact, this man is practically an insane man for what he did for friends and what he got out of it. As a matter of fact, he got no profits out of it. He is a handy andy and a happy hooligan who does too many favors for his friends. He is a very stupid man for having involved himself for practically no remuneration to himself. As your Honor knows and Mr. Davis knows, we were the first ones to indicate a willingness to save the Court time and trouble and enter a plea, and we would ask your Honor to consider that in passing judgment on this man.

The Court: Well, Mr. Gillen, I, of course, take that into account. I cannot ignore the testimony of the Agent as to the extent of the defendant's activities as to whether he is a retailer or not. The Agent has testified to the fact that he was constantly selling narcotics along with these others. [20] He has a prior criminal record, of course. He is also an addict, as you have stated. I sentenced the defendant Bruno, who went to trial before a jury and was found guilty on two counts, to a total of fifteen years in prison. The defendant Billeci pleaded to one count, and I think three other counts were dismissed.

Mr. Davis: Yes, your Honor.

The Court: And I sentenced the defendant Billeci to ten years. The indictment as to this defendant contains five counts. He has pleaded guilty to the fifth. He is an addict, but I think the defendant Bruno is an addict too. Mr. Duane called my attention to that at the time of entering a judgment, and subsequently in the written order it may

be I included a recommendation to the Attorney General that he be either sent to a narcotic institution or be given such treatment as is available in connection with his addiction. I do not feel that I can make any different distinction in this case. It seems to me the situation is not greatly different.

Mr. Gillen: May I make one observation to your Honor in that connection, however? I think that the working record of this man as against the other man involved is different.

The Court: Granted that is so, I have to base my judgment—it may be harsh—upon the theory, as I have said before, that these men are just too dangerous to the community [21] and the rest of the people. I take no pleasure in having to impose what may appear to be somewhat severe sentences, but the urge on behalf of the whole community is too strong to be ignored. It may fall somewhat harshly in this case upon the wife of the defendant, but he is just too dangerous a man not to be dealt with in what may appear to be a somewhat harsh manner. It is too dangerous for all of these young people and all those who come in contact with these men who deal in narcotics for profit, and my conscience would not permit me under those circumstances to deal any differently with this case.

The judgment will be that the defendant serve a term of ten years in the Federal penitentiary and pay a fine of \$1,000.

Mr. Gillen: Will your Honor make a similar recommendation as you did?

The Court: I will attach to the judgment in this case a similar recommendation to that made in the case of the defendant Bruno.

Mr. Gillen: That he either be confined to a narcotic institution or given whatever treatment is necessary.

Mr. Davis: If the Court please, in view of the plea in this case, I would recommend that Case 30074, United States vs. Bruno and Flier, be dismissed.

The Court: Very well, I will make that order.

Certificate of Reporter

I, J. J. Sweeney, Official Reporter, certify that the foregoing 22 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: No. 11656. United States Circuit Court of Appeals for the Ninth Circuit. Renaldo Ferrari, Appellant, vs. United States of America, Appellee. Second Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 6, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RENALDO FERRARI,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

OPENING BRIEF FOR APPELLANT.

HALLINAN, MACINNIS & ZAMLOCH,

RALPH B. WERTHEIMER,

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Merchants Exchange Building, San Francisco 4, California,

Attorneys for Appellant.

FILED

FEB 12 1941

PAUL P. O'BRIEN,
CLERK

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Appellee.

OPENING BRIEF FOR APPELLANT.

Renaldo Ferrari, in an indictment naming sixteen co-defendants, was charged with the crime of concealing and facilitating the concealment of a derivative and preparation of morphine, to wit, heroin (21 U.S.C.A., Section 174) and for the crime of conspiracy (18 U.S.C.A., Section 88). After a waiver of trial by jury (R. 40), the defendant was granted a separate trial (R. 41). The government then moved to dismiss the conspiracy charge and all counts of the indictment save Counts One, Thirty-nine and Forty, charging concealment and facilitation of concealment of heroin, and Ferrari was convicted and sentenced to one day's imprisonment and fined \$1.00 on Count One of the indictment, and convicted and sentenced to three years and fined \$100.00 on each of Counts Thirty-nine and Forty of the indictment.

The appellant prosecutes this appeal contending that the evidence was insufficient as a matter of law to sustain the judgment, that there was a variance between the offense charged in Count One of the indictment and the evidence offered to sustain the charge, and that he did not receive a fair trial.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction of the court are as follows:

(1) The jurisdiction of the District Court, 28 U.S.C.A., Section 41, subdivision 2. This section provides that the District Courts shall have original jurisdiction of

“all crimes and offenses cognizable under the authority of the United States.”

(2) The jurisdiction of this court upon appeal to review the judgment in question. 28 U.S.C.A., Section 225, provides:

“The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions—first in the District Court in all cases save wherein a direct review of the question may be had in the Supreme Court under Section 345 of this title.”

(3) The pleadings necessary to show the existence of jurisdiction:

The indictment (R. 2-33);

Plea of “not guilty” (R. 39);

Notice of Appeal (R. 47).

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The indictment (R. 2-33) reads in part as follows:

“First Count

(Jones-Miller Act, 21 U.S.C., Section 174)

“The Grand Jury charges: That Vincent Bruno and Renaldo Ferrari, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.”

Count Thirty-nine of the indictment charges that Frank Flier and Renaldo Ferrari, on or about the 17th day of January, 1946, did conceal and facilitate the concealment of one dram of heroin, and Count Forty charges that Vincent Bruno, Frank Flier and Renaldo Ferrari, on or about the 28th day of January, 1946, did conceal and facilitate the concealment of approximately one dram of heroin. Both counts further charge that said concealment was in violation of 21 U. S. C., Section 174.

Count Fifty-five of the indictment charges that the same offense was committed on or about February 21, 1946 by Vincent Bruno, Frank Flier, Salvatore Billeci, Renaldo Ferrari and Samuel Louis Cohen.

Count Fifty-six of the indictment charges that the defendants named in the caption, including appellant, did conspire together to receive, conceal, buy, sell and facilitate the transportation and concealment of heroin in violation of Section 174, Title 21, U. S. Code. The crime here charged is a conspiracy under 18 U. S. C., Section 88.

Counsel for appellant made a motion for a bill of particulars (R. 35) and a motion to dismiss the indictment (R. 36). Both motions were denied (R. 39). Appellant filed a written waiver of trial by jury (R. 40). Appellant made a motion for severance of trial and this motion was granted (R. 41).

Appellant's trial began before the Honorable Louis E. Goodman, District Judge, April 23, 1947. The government moved to dismiss all counts of the indictment as to the defendant Ferrari, other than Counts One, Thirty-nine and Forty (R. 51) and all of said counts save Counts One, Thirty-nine and Forty were dismissed by the trial court (R. 42).

Count One of the indictment reads as follows:

“The Grand Jury charges that Vincent Bruno and Renaldo Ferrari, on or about the 5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.” (R. 2.)

The government called as its first witness G. E. Mallory, who identified as containing heroin three envelopes subsequently alleged by witnesses called by the government to have been removed from the Star Dust Bar, 1098 Sutter Street, in the City and County of San Francisco, on January 5, 1946, January 17, 1946 and January 18, 1946 (R. 54-58).

Thomas E. McGuire, a Federal Narcotics Agent, next called by the government (R. 58), testified that on January 5, 1946 he was concealed in the basement of an apartment house located on the northeast corner of Larkin and Sutter Streets, from which he could observe without being seen the contents of the liquor room of the Star Dust Bar. The witness testified that *Frank Flier entered the liquor room and removed a bindle from where it was hidden*. Flier then extracted some of the white substance from the bindle with a penknife and inhaled the substance into his nostrils. *A minute or two later Ferrari entered the liquor room and Ferrari, the witness testified, then inhaled from the penknife. Ferrari handed back the package or bindle and the knife to Flier. Flier then hid the bindle between three or four beer cases* (R. 63, 64). The witness testified that he could not see Ferrari come down the hall from the bar in the front of the Star Dust Bar to the liquor room.

The government then called Narcotics Agent William H. Grady (R. 69). Grady testified that on January 5, 1946, at or about the hour of 8:35 P.M., *he observed Flier enter the liquor room and close the door. Shortly thereafter Ferrari rapped on the door, Flier*

opened the door and Ferrari entered. Flier handed a penknife and bindle to Ferrari, who inhaled from the white substance on the penknife. Grady then changed his post and observed that Ferrari then left the liquor room. A few seconds later Flier closed the door and joined Ferrari and they walked together into the bar (R. 70, 71).

The Thirty-ninth Count of the indictment charges:

“That Frank Flier and Renaldo Ferrari, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.” (R. 20.)

Narcotics Agent McGuire testified that on January 17, 1946, at or about the hour of 11:30 P.M., “*prior to their entering into the liquor room*” (R. 67), *Flier withdrew the bindle from the place of concealment. Ferrari then used it in the same manner in which he had on the first occasion; Ferrari then handed the bindle back to Flier and “Flier again concealed it in the same place of concealment between the whiskey bottles,”* (R. 67).

The agent, Grady, testified that on January 17, 1946, at the same time and place, *Flier entered the liquor room first and reached down and removed the*

bindle from the place of concealment. Ferrari then entered, Flier used the contents, then Ferrari used the contents, then "as they left, Flier returned the package to its hiding place" (R. 72, 73).

Narcotics Agent Henry B. Hayes, next called by the government (R. 76), testified that on January 17, 1946 he observed *Flier remove the bindle from its hiding place, Flier used the contents, Flier then passed the package to Ferrari, who used it. He further testified,*

"and then they left and as they left I saw Flier do the same thing before he closed the door and go under the empty beer cartons, moved and placed something there." (R. 76, 77).

Count Forty of the indictment charges:

"That Vincent Bruno, Frank Flier and Renaldo Ferrari on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United State of America contrary to law, as said defendants then and there knew." (R. 21.)

Agent Grady testified that *Flier entered the liquor room; that Flier removed the bindle from the hiding place; that Flier walked into the liquor room accompanied by Ferrari and Bruno. Flier then opened the*

package and using a small knife inhaled from the contents. Bruno and Ferrari in that order inhaled.

“Flier then refolded the package and placed the narcotics back in the hiding place.” (R. 74).

At the conclusion of the government’s case Mr. MacInnis made a motion to dismiss the First Count on the grounds of a fatal variance between the offense charged and the proof offered (R. 80). The motion was denied by the trial court (R. 83).

Mr. MacInnis then moved for a dismissal of all the charges, upon the ground that the government had not proved that Ferrari had “concealed or facilitated the concealment” of heroin (R. 84). The motion was denied by the court (R. 88).

The defense then put in its case (R. 88). The defense called witness Vincent Bruno (R. 98), who testified that he never saw Ferrari sniff heroin (R. 104) and on cross-examination specifically denied that he saw Ferrari use heroin on January 17 and January 28, and that Ferrari advised against its use (R. 104, 105).

It was stipulated that Salvatore Billeci would testify that he never saw Ferrari take any heroin (R. 107).

The witness Flier, called by the defense, testified that Ferrari never used heroin, that he did not see Ferrari use heroin on January 5, 1946 as charged, and that Ferrari advised against its use (R. 113). Appellant Ferrari was called by the defense (R. 115) and testified that he frequently went to the Star Dust

Bar to drink with his friends (R. 116). He further testified that photographs offered by the defense, taken in May, 1946, showed the position of bottles on the shelves in the liquor room of the Star Dust Bar in the same position that they were in in January and February, 1946 (R. 118). Ferrari further testified that on January 5, 1946 he was at Palm Springs, California (R. 119). His testimony was corroborated by a bill for horseback riding which he had received in a letter postmarked April 22, 1946 (R. 120). Ferrari denied inhaling heroin on January 17 or January 28, 1946, and denied that he is or at any time has been a user of narcotics (R. 124). He further denied that he used heroin in the Star Dust Bar January 5 or January 17 or January 28, 1946.

It was stipulated that the witness Henry Gourdine would testify that Ferrari rode horseback at Palm Springs January 6, 1946 (R. 128).

The government called in rebuttal Narcotics Agent Grady (R. 130), who testified that pictures taken by the defendants in May, 1946 did not represent conditions as they were in January, 1946 (R. 131), but on cross-examination he admitted that his view on those dates was obstructed (R. 134, 135).

The Agent Hayes, called in rebuttal (R. 138) and the Agent McGuire, called in rebuttal (R. 139) did in effect testify no more than that what they had hitherto testified to was the truth.

Mr. MacInnis renewed his motion to dismiss the First Count of the indictment, on the grounds of the

fatal variance between the charge and the proof offered (R. 140), and renewed his motion to dismiss all of the charges, on the grounds that the evidence failed to sustain the offenses charged (R. 140). The court found the defendant Ferrari guilty of all three counts upon which he was tried. Mr. MacInnis made a motion in arrest of judgment and renewed the motion for dismissal made at conclusion of the government's case in chief (R. 141). Mr. MacInnis made a motion for a new trial upon the grounds that the evidence was insufficient and upon all statutory grounds (R. 141), which was denied by the court (R. 142). The court then sentenced Ferrari to one day in jail and \$1.00 in fine on Count One of the indictment and three years imprisonment in the federal penitentiary and \$100.00 fine on Count Thirty-nine and three years imprisonment and \$100.00 fine on Count Forty of the indictment, all of the sentences to run concurrently (R. 142).

SUPPLEMENTAL TRANSCRIPT OF RECORD.

Appellant was tried on the three counts noted on April 23 and April 24, 1947. On April 22, 1947 Frank Flier pleaded guilty before the Honorable Louis E. Goodman to a narcotics charge (Sup. R. 171). Subsequent to the plea of guilty, in proceedings to determine the sentence of Flier, the government agent, William Grady, testified that Renaldo Ferrari was "known to our office as (a) narcotic violator" (Sup. R. 172). The same agent also testified that Flier, Bruno and Ferrari divided money received from the

sale of narcotics (Sup. R. 181, 183). Counsel for Renaldo Ferrari was not present on these occasions and consequently was unable to cross-examine Mr. Grady.

The appellant, Ferrari, was tried in the instant proceedings on the following two days, before the Honorable Louis E. Goodman, but Mr. MacInnis did not learn of the testimony offered concerning Ferrari in the proceedings involving Flier until too late to initiate proceedings to disqualify Judge Goodman, or to argue the point on the motion for a new trial (R. 141).

Assignment of Error No. 1.

The court erred in denying appellant's motion to dismiss Count One of the indictment on the ground of fatal variance between the evidence offered and the offense charged (R. 83, 88).

Assignment of Error No. 2.

The court erred in denying appellant's motion to dismiss Count One at the conclusion of the trial (R. 140).

Assignment of Error No. 3.

The court erred in denying appellant's motion to dismiss all of the charges at the conclusion of the government's case on the ground that the offenses charged had not been proved (R. 84, 88).

Assignment of Error No. 4.

The court erred in denying appellant's motion to dismiss all of the charges after all of the evidence was

in, on the ground of insufficiency of the evidence (R. 141, 142).

Assignment of Error No. 5.

The court erred in denying appellant's motion in arrest of judgment (R. 141, 142).

Assignment of Error No. 6.

The court erred in denying appellant's motion for a new trial (R. 141, 142).

Assignment of Error No. 7.

The evidence was insufficient to establish the offenses charged in the indictment.

Assignment of Error No. 8.

The appellant was denied a fair trial.

ARGUMENT.

POINT 1. INSUFFICIENCY OF THE EVIDENCE.

Count 1 of the indictment charges that Bruno and Ferrari on the 5th day of January, 1946, fraudulently and knowingly did conceal and facilitate the concealment of a bindle of heroin. Count 39 charges that on the 17th of January, 1946, Frank Flier and Ferrari did fraudulently and knowingly conceal and facilitate the concealment of a bindle of heroin. Count 40 charges that Bruno, Flier and Ferrari on the 28th day of January, 1946 fraudulently and knowingly did conceal and facilitate the concealment of a bindle of heroin.

In each count the alleged acts of the appellant, Ferrari, are charged to be in violation of the Jones-Miller Act, 21 U.S.C., Section 174, which provides:

“If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, or any territory under its control or jurisdiction, contrary to law, or assists in doing so or *receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale* of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.”

The evidence offered by the government is totally insufficient to establish the offense with which appellant is charged: concealment and facilitation of concealment of heroin. A review of the evidence offered by the government, set forth above in appellant's statement of the case, discloses that upon each of the three days on which a violation is charged, Frank Flier entered the liquor room in which, the agents testified, the bindles were concealed, *then* Ferrari entered that room; Ferrari then inhaled from the bindle and returned the bindle to Flier; Ferrari then left the room, *after which* Flier returned the bindle to the place of concealment. In no case does the evidence

presented by the government disclose that Ferrari ever at any time concealed the bindle of heroin, that the bindle was removed in his presence from the place of concealment, or that Ferrari returned the bindle to the place of concealment, or that the bindle was returned to the place of concealment in his presence. The government's evidence discloses no more than that Ferrari had but a brief and transitory possession of the bindle incident to his making use of the contents.

The defendant Ferrari testified that he was not a user of narcotics, three witnesses testified they had never seen Ferrari use heroin at any time and specifically on January 17 and January 28, 1946, and Ferrari testified and was supported by corroborative evidence that on January 5, 1946, he was in Palm Springs, California.

The authorities make a sharp distinction between possession and concealment. Thus, it is stated by William J. McFadden in "The Law of Prohibition" (Callaghan & Co., 1925), Section 299, at page 316:

" '*Possess*' distinguished from '*conceal*'. Both language and law distinguish between the words '*possess*' and '*conceal*'. One may possess a thing without concealing it or he may conceal it without possessing it, having parted with possession in the act of concealing it. So also, he may both possess and conceal a thing, but concealment involves an act added to possession and denotes an intention of some sort. One may quite lawfully possess a deadly weapon, but if he carries it concealed he commits a misdemeanor. Implicit in concealment, if innocent, is the element of protection; if not innocent, the element of guilt. We cannot hold

that the possession of liquor, as denounced by the National Prohibition Act in general terms and without regard to whence it came or what is to be done with it, is the same thing or constitutes the same offense as receiving and concealing liquor imported contrary to law. * * *”

Burdick says in “The Law of Crimes” (1946), Volume 3, Section 744, at page 96:

“To ‘conceal’, in connection with carrying concealed weapons, is to hide, secrete, screen, cover, and a concealed weapon may be defined, in general, as one which is hidden from the ordinary observation of those who, in the usual association of life, come into contact with the person carrying it. * * *”

Furthermore, the statute itself distinguishes between possession and concealment, and under the statute neither possession nor use is made an offense.

Examination of the record discloses that the trial court proceeded upon the assumption that proof of unexplained possession was alone sufficient to sustain a conviction for violation of U.S.C. Section 174 (R. 85-88). Thus the court states (R. 87):

“The Court. If you will read the proceedings in connection with the Jones-Miller Act, you will find there why the second part of section 174 was put into the act. The difficulty in detection and enforcement is so great, Congress indicated, this most unusual provision was put into the section: *If you show possession that is sufficient evidence to show a violation of the statute, unless there is a showing to the satisfaction of the jury on the trial of the case, satisfactory explanation as to*

that possession. In other words, a man might possibly have had possession of the narcotic innocently. It is possible. There are conceivable circumstances under which that might well happen. The burden, however, is put upon anyone who is in possession of a narcotic drug to explain the possession. That is the philosophy behind it, and therefore it does not require the niceties of proof that are required for a violation of other statutes. *That is why I would say that it is not necessary for a court to scrutinize the technical nicety as long as possession is shown, in the case of proof under this statute, as it might be under any of the other criminal statutes.* You asked me to more or less state my view in the particular instance you mentioned. That is the way I feel about it. I have never read any decisions to the contrary, but if some higher court wants to construe that statute more narrowly, some other judge might do that. But that is my view. I will deny the motion.”

The decisions go no further than to hold, however, that proof of possession of the narcotic drug under the statute raises only the presumption that the narcotic was imported contrary to law and that the defendant had knowledge of such importation. The decisions expressly limit the presumption set forth in the second sentence of U. S. C. Section 174 and make clear that proof of possession is not proof of the act of concealment, sale, transportation, receiving or buying.

Yee Hem v. U. S., 45 S. Ct. 470; 268 U. S. 178,
69 L. Ed. 904;

Gee Woe v. U. S., 250 Fed. 428;

Hooper v. U. S., 16 Fed. (2d) 868 (CCA-9);

Frank v. U. S., 37 Fed. (2d) 77.

In *U. S. v. Steinberg*, 123 Fed. (2d) 425, the court said, at page 427:

“By force of this section possession of narcotics gives rise to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation * * * a defendant on trial may overcome these inferences by satisfactory proof that possession of narcotics did not involve a violation of the statute either because the narcotics were not imported contrary to law, or because the accused had no knowledge of unlawful importation. The explanation of possession to serve as a defense must not only be believed by the jury but must also be one that shows a possession lawful under the statute.”

Speaking of this limitation as to the inference justified by proof of possession, the court in *U. S. v. One Studebaker Roadster*, 40 Fed. (2d) 557, pointed out, at page 558:

“* * * the statute is in contravention of common law principles, is penal, and must be strictly construed.”

It is well recognized that before proof of one fact in a criminal proceeding may be taken as evidence of proof of another fact which must be proved as an element in the criminal charge, there must be a rational evidentiary relation between the two facts. Wharton

in his "Criminal Evidence" (11th Edition, 1935), Volume 1, page 81, states:

"* * * The rule is well established that the legislative body may provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts if there is a natural or rational evidentiary relation between the fact proved and those presumed," citing *Yee Hem v. U. S.* supra.

If the court's construction of the statute to the effect that proof of possession may be, in the absence of explanation, presumptive evidence of concealment, then proof of possession by the same token would give rise to an inference of sale or transportation or purchase. The point need not be labored that there is no natural or rational evidentiary relation between possession and sale or purchase or transportation. Hence, on principle as well as on authority the position taken by the trial judge that proof of possession was presumptive evidence of concealment was erroneous.

Nor is the charge of facilitation of concealment sustained by the evidence presented by the government. To facilitate means "to make easy." At the very least it requires a participation in the act of concealment. Nothing in the government's case as heretofore analyzed indicates that the appellant, Ferrari, participated in the act of concealing. Upon each date the heroin was removed without the participation or assistance of Ferrari from its place of concealment, and returned, without his participation or assistance,

by Frank Flier. Unless the words "facilitation of concealment" are to be construed as meaning "possession" or "use", they do not diminish the burden upon the government, but, as has been noted, the statute fails to make either possession or use an offense. In short, in this case the government has attempted to use the charge of facilitation of concealment as a catch-all to cover acts not made offenses by the statute.

That the position taken by appellant is sound is sustained by an analysis of the authorities. A review of all the cases decided under Section 174 U.S.C., in which the sufficiency of the evidence to sustain a charge of concealment or facilitation of concealment was reviewed by appellate courts, demonstrates clearly that in no case has the government relied upon so slender a base to sustain this charge. In all of the cases charging unlawful concealment in which the conviction was sustained proof was offered of *an overt act in addition to mere possession or use which supported the inference of concealment*.

Thus, in *Gee Woe v. U. S.*, 250 Fed. 428, where the indictment charged receiving and concealing narcotic drugs, knowing them to be imported contrary to law, a conviction was sustained. The evidence disclosed that the defendant answered the knock on his door of the arresting officers, turned off the lights without admitting the officers, and was next seen returning from the backyard next to which were found three tins of the narcotic, an overcoat, and a warm opium pipe. An opium pill was also found on the defendant's person.

In *Camou v. U. S.*, 276 Fed. 120 (CCA-9), where a conviction for concealment was sustained, the evidence disclosed that the defendant had keys to a trunk in which the narcotics were hidden.

The evidence which was held sufficient in *Sam Wong v. U. S.*, 2 Fed. (2d) 969 (CCA-9) to sustain conviction for unlawfully purchasing, concealing and distributing opium disclosed that morphine was found in the bedroom, concealed under fruit boxes below the bunk upon which the defendant slept. In addition, the defendant had admitted paying off his help in the morphine.

In *Foster v. U. S.*, 11 Fed. (2d) 100 (CCA-9), there was an indictment for purchasing, selling, dispensing and distributing. The evidence found sufficient to sustain the conviction consisted of marked bills given to an informer who purchased morphine from the defendant. In addition, when the defendant was arrested, a bundle of morphine was found in his vest pocket; immediately upon arrest he dropped two bundles to the sidewalk and at that time admitted receipt of the marked bills.

In *Rosenberg v. U. S.*, 13 Fed. (2d) 369 (CCA-9), the evidence was held sufficient to show that the defendants were guilty of unlawful purchase, distribution, sale, concealment and facilitation of transportation. The evidence disclosed that the defendant Evans had rented a room in which subsequently was found a valise containing morphine. The inspectors making the arrest knocked on the door of the room, but there was no response for a period of fifteen minutes.

Evans and the defendant Rosenberg came out of the room and started down the stairs and were arrested. Rosenberg had upon his person a package of morphine, and search of the room revealed vials of morphine and a valise, which Rosenberg admitted was his, containing a quantity of the same drug.

In *Hooper v. U. S.*, 16 Fed. (2d) 868 (CCA-9), where the charge was receiving, concealing, buying, selling and facilitating transportation and concealment, the conviction was sustained where the evidence disclosed that the defendant Hooper had offered morphine for sale to an informer.

The defendant was indicted for fraudulently concealing two cans of smoking opium in *Lee Kwong Non v. U. S.*, 20 Fed. (2d) 470. The conviction was sustained upon evidence which disclosed that federal agents, upon smelling opium fumes coming from a laundry, asked the defendant whether opium was being smoked, were told, "No, go search", and upon searching the premises found two cans of opium hidden in a pile of coal behind a partition in the back of the laundry.

A conviction for concealment was sustained in *Frank v. U. S.*, 37 Fed. (2d) 77, where the evidence disclosed that the narcotic was found in the pocket of the defendant and there was evidence of a conspiracy to sell the proscribed drug.

A charge of concealment was held to be sustained by the evidence in *U. S. v. Mule*, 45 Fed. (2d) 132, where the evidence disclosed a sale by the defendant to an informer.

In *Gowling v. U. S.*, 64 Fed. (2d) 796, a conviction for concealing, buying, selling and receiving unlawfully imported narcotics was sustained where the evidence was that the narcotics were found concealed in appellant's vest and in a lemon hull.

In *Borgfeldt v. U. S.*, 67 Fed. (2d) 967 (CCA-9), the defendant was charged with concealment of morphine. It was held there was sufficient evidence to go to the jury where the evidence disclosed that as the defendant got out of his automobile he deliberately dropped two paper bindles into the street.

A conviction for unlawful sale and concealment of narcotics was upheld in *Mullaney v. U. S.*, 82 Fed. (2d) 638. In this case the evidence disclosed that the defendant admitted he owned the drugs which were found in his home, in addition to which marked money was found in his bed.

A conviction for felonious concealment of 45 grains of smoking opium was upheld in *Lee Dip v. U. S.*, 92 Fed. (2d) 802 (CCA-9). In this case defendant's partner was arrested coming into defendant's home and at that time attempted to rid himself of narcotics which he had in his pockets. A search of the premises revealed the opium concealed in jars in the bathroom of defendant's living quarters.

The case of *Pon Wing Quon v. U. S.*, 111 Fed. (2d) 751 (CCA-9), is one in which the evidence clearly indicated a concealment. Here the defendant was indicted for importing, facilitating the transportation, concealing and facilitating the concealment of opium. The defendant was an expressman, and the evidence

disclosed that when he learned of the presence of agents he backed up to a trunk containing narcotics and surreptitiously placed a sticker on it. The sticker was a customs label which would have precluded further examination of the trunk.

In *U. S. v. Cohen*, 124 Fed. (2d) 164, a conviction for concealing and transporting morphine was sustained where the evidence disclosed both manufacture and sale.

Evidence was held sufficient to sustain a conviction of "assisting in the concealment of smoking opium" in *Wong Chin Pung v. U. S.*, 142 Fed. (2d) 57 (CCA-9). In this case the evidence disclosed that the defendant was apprehended in an opium smoking den in which opium was concealed in a woodpile and that the defendant had "operated the two doors by which the opium was made difficult of access and concealed from the authorities."

In *Brady v. U. S.*, 148 Fed. (2d) 394 (CCA-9), the evidence was held sufficient to sustain a conviction of appellant and his wife for receiving, concealing and transporting heroin where immediately prior to the arrest of defendant's wife the defendant threw the package containing the narcotics onto the floor of a public garage.

In *U. S. v. Li Fat Tong*, 152 Fed. (2d) 650, evidence that the defendant concealed twenty tins of smoking opium in his baggage in a shoe box was held sufficient to sustain a conviction on a charge of concealment and transportation.

In summary, then, in no reported case in which the sufficiency of the evidence to sustain a conviction for concealment or facilitation of concealment has been considered upon appeal has the government failed to offer proof of some overt act in addition to possession or use. The absence of a decision in which less evidence was offered is persuasive evidence that hitherto, at least, the government has agreed with the position taken by appellant in this case that proof of possession or use alone is insufficient to justify a prosecution for concealment.

POINT 2. THERE IS A FATAL VARIANCE BETWEEN THE CHARGE IN COUNT ONE OF THE INDICTMENT AND THE EVIDENCE.

Count One of the indictment charges that Vincent Bruno and Renaldo Ferrari on the 5th day of January, 1946, fraudulently concealed and facilitated the concealment of one bindle of heroin. The government offered evidence that on that date not Vincent Bruno but Frank Flier removed the bindle from its place of concealment and returned it after Ferrari had used the contents (R. 62-77). To charge that Bruno and Ferrari concealed the heroin and to introduce evidence that Flier and Ferrari committed the act charged is a material variance.

Wharton on "Criminal Evidence" (11th Edition, 1935), says, at page 1802:

"The rule now accepted by all courts is that a variance in criminal law is not now regarded as material unless it is of such a substantive char-

acter as to mislead the accused in preparing his defense, or is likely to place him in a second jeopardy for the same offense. Hence, the tests of a fatal variance are: was defendant misled in preparing his defense? Will defendant be protected against a future proceeding involving the same charge? * * *”

In support of the rule Wharton cites *Gilbeau v. U. S.*, 288 Fed. 731, wherein the court stated, at page 732:

“If the rule against a material variance be considered technical, yet it is sound, because it is based upon the constitutional guarantee that an accused should be informed of the nature and cause of the accusation against him, and only by adhering to it can the danger of misleading a defendant be avoided.”

As Mr. MacInnis pointed out to the trial court (R. 80-81), in this case, where sixteen defendants in addition to Ferrari were charged with narcotics violations (R. 2), Ferrari would be and in fact was misled in preparing his case where the charge was concealment on a given date with a specified defendant and the evidence which the government offered was that Ferrari committed the offense with another of the sixteen defendants named in the indictment.

POINT 3. THE APPELLANT WAS DENIED A FAIR TRIAL.

The appellant was tried on the three counts of the indictment previously noted on April 23 and 24, 1947.

On April 22, 1947, the Honorable Louis E. Goodman, who presided at the trial of the appellant, had heard evidence, in proceedings supplemental to a plea of guilty entered by Frank Flier, concerning Ferrari. The evidence regarding Ferrari was of the most prejudicial character, for the agent who testified in the Flier proceedings stated that Ferrari was a known narcotic violator (Sup. R., page 172) and also testified to evidence of an even more serious character, so far as Ferrari was concerned, by stating that Flier, Bruno and Ferrari had divided up money from the sale of narcotics (Sup. R. 181, 183).

When this evidence was offered, Ferrari's counsel, Mr. MacInnis, was not present, and so was denied the right of cross-examination. The very next day the same court tried the appellant in the case which is now on appeal. Mr. MacInnis was at the time unaware that the trial judge had heard this evidence concerning Ferrari, and consequently was unable to take proceedings for his disqualification, or to urge this ground upon the motions for a new trial and in arrest of judgment.

It is submitted that the evidence that the trial court received concerning Ferrari was almost certain to prejudice him against appellant in appellant's trial. It is submitted that it was the reception of this evidence, to which no counter testimony was ever offered and concerning which no cross-examination was had, which accounts for the trial court's readiness to convict appellant upon so slender a thread of evidence.

CONCLUSION.

The foregoing arguments should demonstrate that the judgment against the appellant, Ferrari, should be reversed. The errors committed were fundamental and prejudicial. Not only so, but to permit the conviction to stand upon the evidence presented would be in practical effect to amend U.S.C. Section 174 by judicial construction in a manner wholly beyond the intention of Congress.

Dated, San Francisco, California,
February 16, 1948.

Respectfully submitted,
HALLINAN, MACINNIS & ZAMLOCH,
RALPH B. WERTHEIMER,
JAMES MARTIN MACINNIS,
Attorneys for Appellant.

No. 11,656

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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Attorneys for Appellee.

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No. 11,656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 45) of the District Court of the United States for the Northern District of California, Southern Division, convicting the defendant subsequent to a trial without a jury before the Honorable Louis E. Goodman, United States District Judge, of a violation of the Jones-Miller Act. (21 U.S.C. Section 174.) The indictment (Tr. 2) was in 56 counts and charged the appellant and others with violations of the narcotic laws of the United States and with conspiracy. The appellant went to trial on three counts of this indictment, to-wit: Counts One, Thirty-nine, and Forty. Count One (Tr. 2) alleged in substance that the appellant and one Vincent Bruno, on or about the

5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit: a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew. Count Thirty-nine (Tr. 20) alleged in substance that the appellant and one Frank Flier, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew. Count Forty (Tr. 21) alleged in substance that appellant, one Vincent Bruno, and one Frank Flier, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

The Court below had jurisdiction under the provisions of Title 26 U.S.C., Section 41, Subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 225, Subdivisions (a) and (d).

STATEMENT OF FACTS.

The Federal Narcotic Agents testified that during the months of January and February 1946, they had under observation a barroom in the City and County of San Francisco, known as the Stardust Bar; that on the 5th, 17th and 28th days of January, 1946, they had secreted themselves in a room in the rear of the Stardust Bar, from which position they had at all times a liquor storeroom of the Stardust Bar under observation. At about 8:30 on the evening of January 5, 1946, the agents observed Frank Flier enter the liquor storeroom from the rear of the Stardust Bar with appellant. Flier removed a paper from between two beer cases where it was concealed, opened the paper, and using a knife, took some of the contents of the paper and with the knife sniffed the contents into his nostrils. Flier then passed the knife and paper to the appellant, who likewise sniffed some of the white substance into his nostrils. After receiving the paper from the appellant, Flier secreted the paper in its former place of concealment in the room.

At approximately 10:00 o'clock that same evening, two of the agents went into the liquor room

and took from this hidden paper a small quantity of the substance, which was later identified by a Government chemist as heroin hydrochloride. No one else disturbed the package between 8:30 and 10:00 o'clock P. M.

On the 17th day of January, 1946, at approximately 11:00 o'clock in the evening, the agents again went into the liquor room and took a sample of the package, which was subsequently identified as heroin hydrochloride. At approximately 11:30 o'clock that same evening Flier and the appellant once again came into the liquor room; Flier went over to the place of concealment and took out the paper; and both inhaled some of the white substance from the said package. Flier returned the paper to its hidden location. No one else had disturbed the package during the half hour interval between 11:00 and 11:30 o'clock.

On the 28th day of January, 1946, at about five minutes past 5:00 o'clock in the afternoon, Flier, together with one Vincent Bruno and appellant, came into the liquor room and removed the package from its concealed position. After Bruno and the appellant both inhaled the white substance from the knife, the package was again hidden by Flier.

At approximately 8:50 o'clock in the evening of the same day one of the agents once again removed some substance from the said package in the liquor room. A Government chemist later identified said substance as heroin hydrochloride. No one had disturbed the package between 5:05 P. M. and 8:50 P. M.

The above constituted the case of the Government.

The appellant was called as a witness on his own behalf. He testified that over the periods of time covered in the incident he had gone to drink and meet his friends at the Stardust Bar. On the night of January 5, 1946, he said he was in Palm Springs, California. The appellant denied that he inhaled any quantity of heroin or any other narcotic on the 17th and 28th days of January, 1946, although he admitted that he did go to the Stardust Bar to drink on said dates. Frank Flier and Vincent Bruno, called as defense witnesses, testified that they never saw the appellant use heroin on the dates testified to by the agents.

QUESTIONS.

I. Is the possession of narcotics for the purpose of use sufficient to justify conviction?

II. Was there a fatal variance between the allegations contained in Count One of the indictment and the evidence presented at the trial?

III. Did the appellant receive a fair trial before Hon. Louis E. Goodman?

ARGUMENT.

I. POSSESSION FOR PURPOSES OF USE IS SUFFICIENT TO JUSTIFY A CONVICTION.

The appellant argues that the government's evidence of his possession of heroin proved possession

for use only and therefore was insufficient to prove the offense under the statute (21 U. S. C. § 174).¹ The facts in the instant case are identical with the facts in *Pitta v. United States* (C.C.A. 9), 164 F. (2d) 601. In that case the defendant entered the same liquor room of the Stardust Bar with one Vincent Bruno under the observation of Federal Narcotic Agents. Bruno removed from some beer cases a paper containing the heroin in question. After inhaling some of the contents of the paper, Bruno handed the paper to the defendant, who likewise sniffed the narcotic. Defendant then refolded the paper and handed it to Bruno, who restored it to its hiding place. A few hours before this incident occurred, the Narcotic Agents had gone into the liquor room and taken a sample of the paper's contents, which was later identified as heroin. In this case, as in that case, the defendant only obtained possession for the purpose of use.

In affirming the conviction of the defendant in the *Pitta case*, this Court said:

“Appellant was shown, certainly, to have had possession of the narcotic for an illegal purpose, namely, for use. We think that possession for use does not differ, in legal effect, from possession for any other illegitimate purpose, such as for sale or distribution. Possession of any sort is sufficient to raise the presumption and to place

¹21 U.S.C. 174: “* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

upon the accused the burden of explaining the possession to the satisfaction of the jury. *Ng Choy Fong v. United States*, 9 Cir., 245 F. 305, certiorari denied 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539; *Yee Hem v. United States*, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904. The aim of the statute is to stamp out the existence of narcotics in this country except for legitimate medical purposes. *Yee Hem v. United States*, supra. It follows that the evidentiary consequence flowing from proof of possession was here operative.

“We think, moreover, that independently of the presumption arising from unexplained possession there was evidence from which the jury might find that appellant participated in or facilitated the concealment of the narcotic.”

Therefore, this Court in the *Pitta* case clearly holds that under the statute above cited, possession for use is sufficient to justify conviction.

II. THE VARIANCE BETWEEN THE ALLEGATION CONTAINED IN COUNT ONE OF THE INDICTMENT AND THE EVIDENCE PRESENTED WAS NOT FATAL.

Count One (Tr. 2) of the indictment alleged that appellant and one Vincent Bruno, on the 5th day of January, 1946, in San Francisco, California, fraudulently and knowingly concealed and facilitated the concealment of one bindle of heroin. The evidence introduced by the Government showed that one Frank Flier was present when the appellant committed the offense charged in the indictment. Such a variance is not fatal in this case.

Section 269 of the *Judicial Code*, as amended, 28 U.S.C.A., Section 391, provides:

“On the hearing of any appeal, certiorari, writ of error, or motion of a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

In *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 630, 79 L. Ed. 1314, a criminal case dealing with variance, the Court said:

“The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to ‘affect the substantial rights’ of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Bennett v. United States*, 227 U. S. 333, 338; *Harrison v. United States*, 200 Fed. 662, 673; *United States v. Wills*, 36 F.(2d) 855, 856-857. Cf. *Hagner v. United States*, 285 U. S. 427, 431-433.

“Evidently Congress intended by the amendment to § 269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial

prejudice does not appear, the error must be regarded as harmless. See *Haywood v. United States*, 268 Fed. 795, 798; *Rich v. United States*, 271 Fed. 566, 569-570.”

The appellant in this case had such information as to the charges against him so that he was able to present his defense and was not taken by surprise by the evidence offered at the trial. Appellant's defense to Count One was his testimony that he was in Palm Springs, California, on the evening of the 5th of January, 1946, and, therefore, could not have been present in the rear liquor room of the Stardust Bar in San Francisco, California. It was therefore not material to his defense that a variance appeared in Count One regarding the name of the man who was present when the appellant possessed the heroin for the purpose of use. It was the allegations regarding time, place and acts that were material and important to appellant's defense.

Nor could the appellant again be prosecuted for the same offense because of this variance. It must be recalled that Count One was not a conspiracy count and that Count Fifty-six, which alleged a conspiracy, was dismissed. Nor was this a count alleging a sale between appellant and another person. The presence of another person was not essential to the proof of appellant's guilt. The agents' testimony was that the appellant took the knife and inhaled the heroin from it. From this evidence establishing possession for use arose the statutory presumption that was sufficient to authorize a conviction. In short, the name of the other

person present was not essential to the description of the offense.

III. THE APPELLANT RECEIVED A FAIR TRIAL BEFORE HON. LOUIS E. GOODMAN.

On April 22, 1947, in the case of *United States v. Frank Flier*, No. 30073-G (United States District Court, Northern District of California, Southern Division), Hon. Louis E. Goodman had heard testimony from Narcotic Agent William Grady for the purpose of determining Flier's sentence. The agent made incidental reference to appellant when he testified, "At the time he was in the Vagabond Club he was associated with Renaldo Ferrari, Stanley Paliwode, Walter de Argorio and several other people who are known to our office as narcotic violators." (Supp. Tr. 172). And later the agent made another reference to appellant when he testified, (Supp. Tr. 181):

"The only thing that I can recall to mind right now is that the night before Flier was arrested they were dividing up the profits. There was Ferrari and Bruno and Belleci—or Flier, Bruno and Ferrari—and they divided the money equally on that occasion, although that was not a very large deal."

Appellant contends that this evidence which the trial judge received was almost certain to prejudice him against appellant in appellant's trial commencing the next day, and that if counsel for appellant had known of the agent's testimony in the *Flier* case, he would have filed an affidavit of bias or prejudice for

the purpose of disqualifying the Honorable Louis E. Goodman, and he would have urged this incident in the *Flier* case as ground for granting his motions for a new trial and in arrest of judgment.

Appellant was not deprived of a fair trial because the trial judge heard the above quoted testimony in the *Flier* case. A reading of the record of the case before this Court indicates most convincingly that appellant received all the protection to which he as a defendant is entitled under the Constitution and the laws of the United States. His trial before the Court without a jury was of his own choosing. Nowhere in the record is there found any conduct on the part of the trial judge which would indicate prejudice toward appellant or a prejudgment of this case. The fact that the trial judge had heard the above quoted testimony from the *Flier* case is not sufficient to overcome the well established presumption that a judge has properly performed his duties incident to a conviction. *Hall v. Johnston* (C.C.A. 9), 91 F.(2d) 363, at 364.

Nor would the Honorable Louis E. Goodman have been compelled to disqualify himself from hearing this case if appellant had filed a timely affidavit of prejudice and bias based on the testimony of the *Flier* case. Section 21 of the *Judicial Code*, 28 U.S.C. Sec. 25, provides for the disqualification of a judge for *personal* bias or prejudice. It has been held that when an affidavit charges a bias and prejudice grounded on evidence produced in a prior judicial proceeding before the same judge, such bias and prejudice is not personal and is not sufficient to disqualify. *Craven v.*

United States, 22 F.(2d) 605; *Parker v. New England Oil Corporation*, 13 F.(2d) 497.

In the *Craven* case, the Court said:

“ ‘Personal’ is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived *non coram iudice*. ‘Personal’ characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias * * * against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him.”

The facts urged by appellant as sufficient to disqualify the Honorable Louis E. Goodman are even less indicative of prejudice and bias than the allegations presented by the defendants in the cases above cited. In this case the trial judge heard testimony which included an incidental reference to the appellant. In each of those cases cited, the trial judge’s conduct at the prior proceeding indicated he had formed a firm opinion of the case from the evidence presented. Certainly if the affidavits of prejudice and bias were held insufficient to disqualify in the two cases cited, any affidavit filed by appellant would have been ruled insufficient.

The evidence in this case being sufficient to justify a conviction, there is no ground upon which the decision of the Court below can be properly disturbed.

CONCLUSION.

For the reasons stated, we respectfully submit that the conviction should be affirmed.

Dated, San Francisco,
April 30, 1948.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

ROBERT F. PECKHAM,

Assistant United States Attorney,

Attorneys for Appellee.

No. 11657

United States
Circuit Court of Appeals
For the Ninth Circuit.

STORK RESTAURANT, INC., a corporation,
Appellant,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SA-
HATI, EDMOND SAHATI, ALFRED AN-
SARA, A. E. SYUFY,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED
OCT 3 1947
PAUL S. BERNIERI,
CLERK

No. 11657

United States
Circuit Court of Appeals
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Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Trial before the Honorable Michael J. Roche,
District Judge, sitting without a jury.

In the District Court of the United States, Northern
District of California, Southern Division

25707 R

STORK RESTAURANT, INC., a corporation,
Plaintiff,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SA-
HATI, EDMOND SAHATI, ALFRED AN-
SARA, A. E. SYUFY, FIRST DOE, SECOND
DOE, THIRD DOE, FOURTH DOE, ROE
AND ROE, a copartnership, BLACK COM-
PANY, a corporation,

Defendants.

COMPLAINT FOR INJUNCTION
AND DAMAGES

Count One

1. The plaintiff does not know the true names of the defendants sued herein under the names of First Doe, Second Doe, Third Doe, Fourth Doe, Roe and Roe, a copartnership, and Black Company, a corporation; that said names are fictitious and that plaintiff prays that when it shall have ascertained the true names of said defendants, it may be permitted to amend this complaint by inserting herein the true names of said defendants in lieu of said fictitious names.

2. The ground upon which the jurisdiction of the court depends is diversity of citizenship. Plain-

tiff is a corporation [1*] incorporated under and existing by virtue of the laws of the State of New York with its principal place of business at 3 East 53rd Street, New York City, New York. The defendants are all residents and citizens of the City and County of San Francisco, State of California. The matter in controversy herein exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars (\$3,000.00).

3. The plaintiff now is, and continuously since on or about August 15, 1934, has been operating, maintaining and conducting a restaurant, cafe and night club business under the name "The Stork Club" at No. 3 East 53rd Street, New York City, New York, supplying therein and thereat food, beverage, music and dancing facilities; said plaintiff upon the commencement of said business adopted for the same the trade name "The Stork Club" and continuously thereafter and since on or about August 15, 1934, has used said trade name in the conduct and operation of its aforesaid business, and has been and now is the sole and exclusive owner of, and solely and exclusively entitled to the use of said trade name "The Stork Club."

4. The plaintiff has expended considerable effort and large sums of money, aggregating in excess of Five Hundred Thousand Dollars (\$500,000.00) in the last eleven years, advertising and otherwise promoting its aforesaid business and trade name by

* Page numbering appearing at foot of page of original certified Transcript of Record.

various methods and through various media; plaintiff employes approximately one hundred forty (140) people to provide several hundred customers each day between 11:30 a.m. and 4:00 a.m. with relatively high-priced and high quality food, beverages and entertainment which service yields an average annual gross income of over Five Hundred Thousand Dollars (\$500,000.00); the value of plaintiff's trade name "The Stork Club" is far in excess of Three Thousand Dollars (\$3,000.00).

5. The defendants, after plaintiff had first adopted [2] and used said trade name of "The Stork Club," and on or about April 6, 1945, began the operation of, and continuously since said date have been operating and conducting, a bar, tavern and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, under the name of "Stork Club" and have wilfully, wrongfully, unlawfully and in utter disregard of the rights of said plaintiff, and against its wish and without its permission, assumed and appropriated to their own use the name "Stork Club" and at all of said times have been and now are using said name in the conduct of said business, against the will and consent of plaintiff, to the great damage and detriment of said plaintiff.

6. By reason of the premises and as a proximate result of the aforesaid acts of said defendants, the trade name, the good-will and the reputation and standing of plaintiff have been and will be irreparably damaged, and the trade and business and

good will of plaintiff and the extension and development of its patronage throughout the United States of America, and particularly within the State of California and the City and County of San Francisco, have been, and will be irreparably damaged and interfered with.

7. The defendants will, unless restrained and enjoined by the above-entitled Court, continue to operate and conduct their aforesaid business under the name of "Stork Club" and will continue to do each and all of the acts and things above complained of; plaintiff has no plain, speedy and adequate remedy at law, and actions at law will not afford plaintiff plain, speedy or adequate remedy for said continuing acts of said defendants, and the remedy hereby sought is necessary to prevent a multiplicity of judicial proceedings.

8. Plaintiff has heretofore caused a demand to be made upon said defendants that said defendants desist and discontinue [3] the use of said trade name "Stork Club," but the said defendants have continuously neglected, failed and refused to do so.

9. Plaintiff has not given affirmative consent or authority to defendants or any of them to operate a bar, tavern, cocktail lounge or any other business under the name of "The Stork Club" or "Stork Club."

10. All of the foregoing acts and things so done or caused to be done by said defendants and each of them, have been to the injury and damage of

plaintiff in the sum of Five Thousand Dollars (\$5,000.00).

Count Two

1. Plaintiff hereby refers to and makes a part hereof all of the allegations contained in paragraphs 1, 2, 3, 4, 7 and 10 of Count One.

2. During all of said time herein mentioned and continuously since on or about August 15, 1934, the plaintiff has used in conjunction with its use of the name, "The Stork Club" in its business, an insignia consistng of a stork standing on one leg and wearing a high hat and monocle.

3. By reason of the competent and efficient manner in which plaintiff has been conducting and operating "The Stork Club" as aforesaid, and by reason of the large sums of money expended by plaintiff in advertising and otherwise promoting its said business, the said plaintiff's "The Stork Club" has acquired a widespread and valuable reputation, and has commanded and now commands an extensive patronage throughout the United States; during all of the time said business has been conducted, the same has been, and now is patronized by persons both from in and about the City of New York and from the United States at large, including the metropolitan area of San Francisco, California; during all of said time, said business has been and now is patronized by [4] persons of prominence in social, literary, artistic, professional, commercial, official and cinematic circles; on occasions too nu-

merous to mention, said business during all of said time has been, and now is, referred to, written of, featured and advertised in various newspapers, magazines, periodicals and other printed matter of local and national circulation; that by reason of the foregoing, the said business of plaintiff conducted and operated under the name "The Stork Club" and with the aforesaid insignia used in conjunction therewith, became and now is famous, and as "The Stork Club" is known to countless persons in and about the City and County of San Francisco, State of California.

4. The said defendants and each of them well knowing the foregoing, and with the intention and for the purpose of fraudulently and unlawfully appropriating to themselves and for their own use and benefit, the trade-name, good-will, fame and reputation and trade of plaintiff, on or about April 6, 1945, began the operation of, and continuously since April 6, 1945, have been operating and conducting, a bar, tavern and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, under the name "Stork Club," supplying and furnishing therein beverages and entertainment; said defendants at all times have displayed and maintained, and now are displaying and maintaining, signs, affixed to the exterior of said place of business, and containing the words "Stork Club," and in addition thereto, insignia similar to the aforementioned insignia of plaintiff, and consisting of a stork standing on one leg and wearing a high hat; said defendants at all

of said times, have advertised their said business in the City and County of San Francisco under the name "Stork Club" and have caused said business to be listed in the San Francisco telephone directory under said name; furthermore plaintiff is informed and believes and upon such information and belief alleges that defendants have [5] from time to time represented their business to divers governmental departments of the State of California and of the City and County of San Francisco, as the "Stork Club" and have obtained various municipal and State licenses in and under said name; plaintiff on information and belief, alleges that, from time to time during the period in this paragraph stated, defendants have caused the aforesaid name "Stork Club" and related insignia as hereinabove described, to be used in and about the interior of said defendants' place of business and to be advertised and publicized to patrons therein; said defendants and each of them, have been and now are, profiting from the fame and repute adjunctive to the aforesaid name and related insignia of plaintiff's business.

5. By reason of the premises and as a proximate result of the aforesaid acts of said defendants, great confusion has arisen in the minds of the public and will continue to arise and exist and many of the public will be deceived and misled into believing that defendants' business is connected or associated with, or under the supervision of plaintiff; by reason of the premises the trade name, the goodwill and the reputation and standing of plaintiff have been and will be irreparably damaged and the

trade and business and good-will of plaintiff and the extension and development of its patronage throughout the United States of America and particularly within the State of California and the City and County of San Francisco, have been and will be irreparably damaged and interfered with.

6. Plaintiff has heretofore caused a demand to be made upon said defendants that said defendants desist and discontinue the use of said trade name, "Stork Club" and the aforesaid related insignia, but the said defendants have continuously neglected, failed and refused to do so.

7. Plaintiff has not given affirmative consent or authority [6] to defendants or any of them to operate a bar, tavern, cocktail lounge or any other business under the name of "Stork Club" or "The Stork Club" or to use insignia indicating and relating to the same.

Wherefore, plaintiff prays judgment as follows:

(1) That plaintiff be granted a preliminary and final injunction, enjoining the defendants, their agents, servants, employees and attorneys and all persons in active concert or participation with defendants from:

Using in any way, shape or manner, upon or in connection with any place of business conducted by or for them, including the place of business described in this complaint, or in which they are, or any of them is, or hereafter may become interested, and in any and all advertising, printed, written or

printed matter, directories, and licenses, of every description, plaintiff's trade name "The Stork Club" or any name similar thereto, including the name "Stork Club" and from using in conjunction with any such name or independently any insignia similar to or suggestive of that of plaintiff;

(2) That plaintiff have judgment against defendants and each of them in the sum of Five Thousand Dollars (\$5,000.00) and for its costs of suit herein incurred;

(3) That plaintiff have such other and further order, judgment and decree in the premises as to this Court may appear meet, just and equitable, both pendente lite and as a part of the final judgment and decree herein.

MALONE & SULLIVAN,

Attorneys for Plaintiff. [7]

State of New York,
City of New York—ss.

Andrew Gray, being first duly sworn, deposes and says:

That he is an officer of Stork Restaurant, Inc., the plaintiff named in the foregoing action, to wit, the Secretary thereof; that he has read the foregoing Complaint for Injunction and Damages and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated on information and belief and as to those matters that he believes the same to be true.

/s/ ANDREW GRAY.

Sworn to and subscribed before me this 17th day of December, 1945.

[Seal] ANDREW DE SANTIS,
Notary Public in and for the State of New York,
City of New York.

[Verification as to Notary.]

[Endorsed]: Filed Feb. 25, 1946. [8]

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION

Motion for Preliminary Injunction

Stork Restaurant. Inc., a corporation, plaintiff
above named, moves the Court for:

A preliminary injunction enjoining defendants above named, their agents, servants, employees and attorneys and all persons in active concert or participation with defendants from using, in any way, shape or manner upon or in connection with any place of business conducted by or for them, including the place of business described in plaintiff's complaint on file herein and located at No. 200 Hyde Street, San Francisco, California, or in which they are, or any of them is, or hereafter may become,

interested and in any and all advertising, printed, written or painted matter, directories, and licenses or every description, plaintiff's trade name [9] "The Stork Club" and from using in conjunction with such name, or independently, any insignia similar to, or suggestive of, that of plaintiff, said insignia consisting of a stork standing on one leg and wearing a high hat and monocle, all as in the complaint more particularly described.

Said motion will be made upon the ground that said actions constitute unfair competition and an infringement and invasion of plaintiff's trade name, and will inflict irreparable injury upon plaintiff for which money will not be adequate relief; and that plaintiff has no plain, speedy or adequate remedy at law.

Said motion will be based upon the verified complaint of plaintiff on file herein, and upon the records and files of the above-entitled action and upon such other and further evidence as may be produced at the hearing of said motion.

Dated: San Francisco, California, February 25, 1946.

MALONE & SULLIVAN,
Attorneys for Plaintiff.

Notice of Motion for Preliminary Injunction

To: N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara and A. E. Syufy, 200 Hyde Street, San Francisco, California:

Please take notice that the undersigned will

bring the within and foregoing Motion for Preliminary Injunction on for hearing before the above-entitled Court in the Courtroom of Michael J. Roche, Judge of said Court, in the Post Office Building, Seventh and Mission Streets, San Francisco, California, on the 4th day of March, 1946, at ten o'clock a.m. of said day or as soon thereafter as counsel can be heard.

Dated: This 25th day of February, 1946.

MALONE & SULLIVAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 25, 1947. [10]

[Title of District Court and Cause.]

AFFIDAVIT OF DEFENDANT N. SAHATI,
IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

State of California,
City and County of San Francisco—ss.

N. Sahati, being first duly sworn, deposes and says:

That he was one of the owners of the "Stork Club," a bar and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, and is now the manager thereof.

That affiant and the other named defendants purchased said business on April 6, 1945, from the former owner thereof, to-wit: one William Bush, and that affiant and said other defendants have owned and operated said business since said date; that on

April 6, 1945, and for a long time prior thereto said premises were owned [14] and operated under said name of "Stork Club," and that affiant and said other defendants have never changed said name but have continued to operate said business thereunder; that said business is a bar, tavern and cocktail lounge and is not what is commonly known as a night club; that affiant and other defendants do not have music, entertainment or dancing facilities in said premises; that plaintiff's place of business is approximately 3000 miles away from defendants' place of business; that affiant and said other defendants have never had and do not now have any intention to trade upon the name or reputation of said plaintiff or its place of business; that affiant's place of business is operated daily and open to the public from the hour of 10:00 o'clock a.m. to the hour of 12:00 o'clock midnight seven days a week; that affiant's business is one dealing in medium priced food and beverages and that said business does not furnish any music or entertainment to his patrons; that at the time that affiant and his co-defendants purchased said business and began the operation thereof there were on said premises as part of the equipment thereof certain napkins and other paper goods with the insignia of a stork thereon and the words "Stork Club"; that said paper goods were part of the assets of said business and were used by defendants for a short time in the operation of their said business, but that when said supply became exhausted defendants did not thereafter order any further supply of paper goods similar in char-

acter or printed with the insignia of a stork or with the words "Stork Club" thereon, and have not since used the same.

That neither affiant nor his co-defendants have received any notification from plaintiff at any time since the purchase of said business demanding that said defendants desist or discontinue the use of said name "Stork Club."

That at the time said defendants purchased said business it was a going concern and included among its assets the large Neon [15] sign on the outside of said premises with the words thereon "Stork Club"; that said sign does not have thereon any picturization of a stork in any manner or form but simply the words "Stork Club"; that said sign is a costly sign and that it would cost defendants approximately five hundred (500) dollars to replace the same.

That defendants do not advertise in any newspaper, magazine or periodical of local or national circulation except a few complimentary ads; that defendants do not in any manner hold themselves out to be connected in any way with the "Stork Club" of New York; that defendants have never had and do not have any intention of fraudulently or unlawfully appropriating to themselves or for their own use or benefit the trade name, good will, fame or reputation or trade of plaintiff in any manner whatsoever; that it is true that defendants have listed their place of business in the San Francisco Telephone Directory under the name of "Stork Club" and have also listed their business with

various governmental departments of the State of California and the City and County of San Francisco as the "Stork Club," and have obtained necessary licenses under said name, but affiant alleges that said acts are in no way connected, directly or indirectly, with the alleged Stork Club of New York City.

That defendants' business is entirely different from that of plaintiff in that plaintiff's place of business is very large and it is principally that of a restaurant, cafe and night club, supplying food, beverages, music, floor show and dancing facilities, whereas defendants' business is small and is simply supplying beverages and food at ordinary prices to their patrons without any musical entertainment, floor show or dancing facilities of any kind, except on occasions a pianist.

That defendants' place of business consists of a bar and approximately ten (10) small coffee tables, while plaintiff's business is innumerable times greater in area and in number of [16] employees and in character of operation.

That at no time was it or is it the intention of defendants to trade upon the name of plaintiff in any manner, but simply to operate a tavern and bar and in conjunction therewith to furnish simple foods to its patrons, and that defendants have at no time held themselves out to be connected with plaintiff in any manner whatsoever; that defendants have a modest investment in said business, and if a preliminary injunction is granted against defend-

ants their investment will be irreparably damaged and lost.

That the word "Stork" is the name of a bird and not that of any of the owners or stockholders or officers of the plaintiff's restaurant, and that said name is a general term in which no one can obtain an exclusive right of appropriation to his own use or any sole or exclusive ownership.

Wherefore, affiant respectfully prays that the Court deny plaintiff's motion for a preliminary injunction.

N. SAHATI.

Subscribed and sworn to before me this 15th day of April, 1946.

[Seal] CHALMER MUNDAY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 15, 1946. [17]

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendants N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara and A. A. Syufy above-named hereby move the above-entitled Court to dismiss the above-entitled action because the complaint fails to state a claim against defendants upon which relief can be granted.

Dated: April 15, 1946.

ALBERT PICARD,

Attorney for said Defendants.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed April 15, 1946. [18]

[Title of District Court and Cause.]

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 15th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Michael J. Roche, District Judge.

MOTION FOR A PRELIMINARY INJUNCTION DENIED, MOTION TO DISMISS DENIED

This case came on regularly this day for hearing of motion for a preliminary injunction. After hearing the arguments of Raymond Sullivan, Esq., for plaintiff, and Albert Picard, Esq., for defendant, it is Ordered that said motion be denied without prejudice. Further Ordered that the motion to dismiss be denied; that the defendant be allowed twenty days to answer, and that this cause be continued to April 29, 1946, to be set. [19]

[Title of District Court and Cause.]

ANSWER

Defendants N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara and A. E. Syufy for answer to the first count set forth in the complaint herein:

I.

Allege that they are without knowledge or infor-

mation sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of said first count.

II.

Deny that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand (\$3,000) dollars.

III.

Deny that plaintiff has been or now is or ever was the [20] sole or exclusive owner or solely or exclusively or at all entitled to the use of the trade name "The Stork Club", and as to all of the other allegations of paragraph 3 of said first count allege that defendants are without knowledge or information sufficient to form a belief as to the truth of said allegations.

IV.

Deny that the value of plaintiff's trade name "The Stork Club" is far in excess of three thousand (\$3,000) dollars or any other amount, and deny that the trade name "The Stork Club" is the plaintiff's trade name or that plaintiff is the owner thereof and deny that it has any value, and as to all of the other allegations of paragraph 4 of said first count allege that defendants are without knowledge or information sufficient to form a belief as to the truth of said allegations.

V.

Answering paragraph 5 of said first count defendants admit that on or about April 6, 1945, they

became the operators of and ever since have operated and conducted a bar, tavern and cocktail lounge at 200 Hyde Street, in the City and County of San Francisco, State of California, under the name of "Stork Club", but except as to the matters herein specifically admitted deny each and every allegation set forth in said paragraph 5 of said first count.

VI.

Deny each and every allegation contained in paragraph 6 of said first count.

VII.

Answering paragraph 7 of said first count defendants admit that unless restrained and enjoined by this Court they will continue to operate and conduct their business under the name of "Stork Club", but except as herein specifically admitted deny each and every allegation contained in said paragraph 7. [21]

VIII.

Deny that plaintiff has ever caused a demand to be made upon said defendants that they desist or discontinue the use of said trade name "Stork Club".

IX.

Answering paragraph 9 of said first count defendants allege that the name "Stork Club" has been used in said premises at 200 Hyde Street by the defendants herein and by the predecessor in interest of said defendants who sold said business

and name to said defendants at all times since the 1st day of January, 1940, and that the said name was publicly and openly displayed in said premises and that the said plaintiff has been guilty of laches and delay in taking no action of any kind or character whatsoever against said defendants or the predecessor in interest of said defendants for the period of more than six (6) years from the first use of said name in said premises.

X.

Deny each and every allegation contained in paragraph 10 of said first count and deny that the said plaintiff has been injured or damaged in any amount whatsoever by said defendants or any of them.

Said defendants for answer to the second count set forth in said complaint:

I.

Answering paragraphs 1, 2, 3, 4, 7 and 10 of count one of said complaint as incorporated in count two thereof by reference, said defendants hereby refer to and repeat and make a part hereof for all purposes all of the allegations contained in paragraphs I, II, III, IV, VII and X of the answer to the first count herein set forth.

II.

Allege that they are without knowledge or information [22] sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of said second count.

III.

Answering paragraph 3 of said second count defendants deny that the plaintiff's place of business has at any time been patronized in large part by persons from the metropolitan area of San Francisco, California, and deny that it is known to countless persons in or about the City and County of San Francisco, State of California, and except as to the matters herein specifically denied allege that defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph 3 of said second count.

IV.

Answering paragraph 4 of said second count defendants admit that since on or about April 6, 1945, they have been operating and conducting a bar, tavern and cocktail lounge at 200 Hyde Street, in the City and County of San Francisco, State of California, under the name of "Stork Club" and that they furnished therein beverages and have displayed the name "Stork Club", and that they have advertised under said name "Stork Club" and have caused said name to be listed in the San Francisco Telephone Directory and have used said name to governmental departments of the State of California and the City and County of San Francisco and have obtained licenses under said name, but except as to said matters so specifically admitted herein said defendants deny each and every allegation contained in paragraph 4 of said second count.

V.

Deny each and every allegation contained in paragraph 5 of said second count.

VI.

Deny that plaintiff has ever caused a demand to be made upon said defendants that they desist or discontinue the use of [23] said trade name "Stork Club" or said insignia mentioned in said count.

VII.

Answering paragraph 7 of said second count defendants allege that the name "Stork Club" has been used at said premises at 200 Hyde Street by the defendants herein and by the predecessor in interest of said defendants who sold said business and name to said defendants at all times since the 1st day of January, 1940, and that the said name was publicly and openly displayed in said premises and that the said plaintiff has been guilty of laches and delay in taking no action of any kind or character whatsoever against said defendants or the predecessor in interest of said defendants for the period of more than six (6) years from the first use of said name in said premises.

Said defendants, for a further and separate defense to said complaint and to each of the counts therein set forth, allege that the right of action set forth in the complaint did not accrue within six (6) years before the commencement of this action.

Wherefore, said defendants pray that plaintiff

take nothing by this action and that said defendants have judgment against said plaintiff for their costs of suit incurred herein.

ALBERT PICARD,

Attorney for Defendants N. Sahati, Zafer Sahati,
Sally Sahati, Edmond Sahati, Alfred Ansara
and A. E. Syufy.

State of California,

City and County of San Francisco—ss:

N. Sahati, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing [24] answer; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

N. SAHATI.

Subscribed and sworn to before me this 18th day of July, 1946.

[Seal] CHALMER MUNDAY,
Notary Public in and for the City and County of
San Francisco, State of California.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed July 20, 1946. [25]

[Title of District Court and Cause.]

STIPULATION AND ORDER
CONTINUING TRIAL

It Is Hereby Stipulated, by and between the parties hereto, that the above entitled cause heretofore set for trial on the 3rd day of December, 1946, without a Jury, may be set for trial, without a Jury, on a date suitable to the Court during the first half of the month of January 1947, and without the giving of any other or further notice to the parties hereto.

Dated: November 6, 1946.

MALONE & SULLIVAN,
Attorneys for Plaintiff.

ALBERT PICARD,
Attorney for Defendants.

It Is So Ordered:

MICHAEL J. ROCHE,
Judge of the United States
District Court.

[Endorsed]: Filed Nov. 7, 1946. [26]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS
TO DEFENDANTS' PROPOSED FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW

Comes Now, Stork Restaurant, Inc., a corpora-

tion, plaintiff above named, and offers and files herein its Proposed Amendments to Defendants' Proposed Findings of Fact and Conclusions of Law, served on said plaintiff on the 8th day of April, 1947:

1. Amend Finding of Fact No. I so that said finding shall read as follows:

I.

“The ground upon which the jurisdiction of the court depends is diversity of citizenship. Plaintiff is a corporation incorporated under and existing by virtue of the laws of the State of New York with its principal place of business at 3 East 53rd Street, New York City, New York. The defendants are [27] all residents and citizens of the City and County of San Francisco, State of California. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).”

2. Amend Finding of Fact No. II so that said finding shall read as follows:

II.

“The plaintiff now is, and continuously since on or about August 15, 1934 has been operating, maintaining and conducting a restaurant, cafe and night club business under the name ‘The Stork Club’ at No. 3 East 53rd Street, New York City, New York, supplying therein and thereat food, beverage, music and dancing

facilities; said plaintiff upon the commencement of said business adopted for the same the trade name 'The Stork Club' and continuously thereafter and since on or about August 15, 1934, has used said trade name in the conduct and operation of its aforesaid business, and has been and now is the sole and exclusive owner of, and solely and exclusively entitled to the use of said trade name 'The Stork Club'."

3. Amend Finding of Fact No. III so that said finding shall read as follows:

III.

"The plaintiff has expended considerable effort and large sums of money, aggregating in excess of Seven Hundred Twenty-five Thousand Dollars (\$725,000.00) in the last eleven years, advertising and otherwise promoting its aforesaid business and trade name by various methods and through various media; plaintiff employs approximately two hundred forty-four (244) people to provide several hundred customers each day between 11:30 a.m. and 4:00 a.m. with relatively high-priced and high quality food, beverages and entertainment which service yields [28] an average annual gross income of over Eight Hundred Thousand Dollars (\$800,000.00); the value of plaintiff's trade name 'The Stork Club' is far in excess of *Thousand* Dollars (\$3,000.00)."

4. Amend Finding of Fact No. IV so that said finding shall read as follows:

IV.

“The defendants, after plaintiff had first adopted and used said trade name of ‘The Stork Club’, and on or about March 14, 1945, began the operation of, and continuously since said date have been operating and conducting, a bar, tavern and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, under the name of ‘Stork Club’ and have wilfully, wrongfully, unlawfully and in utter disregard of the rights of said plaintiff, and against its wish and without its permission, assumed and appropriated to their own use the name ‘Stork Club’ and at all of said times have been and now are using said name in the conduct of said business, against the will and consent of plaintiff, to the great damage and detriment of said plaintiff.”

5. Amend Finding of Fact No. V so that said finding shall read as follows:

V.

“By reason of the premises and as a proximate result of the aforesaid acts of said defendants, the trade name, the good-will and the reputation and standing of plaintiff have been and will be irreparably damaged, and the trade and business and good-will of plaintiff and the extension and development of its patronage throughout the United States of America, and

particularly within the State of California and the City and County of San Francisco, have been, and will be irreparably damaged and interfered with." [29]

6. Strike out Finding of Fact No. VI.
7. Strike out Finding of Fact No. VII.
8. Amend Finding of Fact No. IX that said finding shall read as follows:

IX.

"By reason of the competent and efficient manner in which plaintiff has been conducting and operating 'The Stork Club' as aforesaid, and by reason of the large sums of money expended by plaintiff in advertising and otherwise promoting its said business, the said plaintiff's 'The Stork Club' has acquired a widespread and valuable reputation, and has commanded and now commands an extensive patronage throughout the United States; during all of the time said business has been conducted, the same has been, and now is patronized by persons both from in and about the City of New York and from the United States at large, including the metropolitan area of San Francisco, California; during all of said time, said business has been and now is patronized by persons of prominence in social, literary, artistic, professional, commercial, official and cinematic circles; on occasions too numerous to mention, said business during all

of said time has been, and now is, referred to, written of, featured and advertised in various newspapers, magazines, periodicals and other printed matter of local and national circulation; that by reason of the foregoing, the said business of plaintiff conducted and operated under the name 'The Stork Club' and with the aforesaid insignia used in conjunction therewith, became and now is famous, and as 'The Stork Club' is known to countless persons in and about the City and County of San Francisco, State of California."

9. Amend Finding of Fact No. X so that said finding shall read as follows: [30]

X.

"The said defendants and each of them well knowing the foregoing, and with the intention and for the purpose of fraudulently and unlawfully appropriating to themselves and for their own use and benefit, the trade-name, goodwill, fame and reputation and trade of plaintiff, on or about March 14, 1945, began the operation of, and continuously since March 14, 1945, have been operating and conducting, a bar, tavern and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, under the name 'Stork Club,' supplying and furnishing therein beverages and entertainment; said defendants at all of said times have displayed and maintained, and now are displaying and maintain-

ing, signs. affixed to the exterior of said place of business, and containing the words 'Stork Club,' and in addition thereto, insignia similar to the aforementioned insignia of plaintiff, and consisting of a stork standing on one leg and wearing a high hat; said defendants at all of said times, have advertised their said business in the City and County of San Francisco under the name 'Stork Club' and have caused said business to be listed in the San Francisco telephone directory under said name; said defendants at all of said times have used said name 'Stork Club' to governmental departments of the State of California and the City and County of San Francisco and have obtained licenses under said name; said defendants, from time to time during their operation of their aforesaid business have caused the aforesaid name 'Stork Club' and related insignia as hereinabove described, to be used in and about the interior of said defendants' place of business and to be advertised and publicized to patrons therein; said defendants, at all times, have used the name 'Stork Club' in connection with all financial and commercial transactions entered into by them in respect to said business; said defendants and each of them have been and now are, [31] profiting from the fame and repute adjunctive to the aforesaid name and related insignia of plaintiff's business."

10. Amend Finding of Fact No. XI so that said finding shall read as follows:

XI.

“By reason of and as a proximate result of the acts of said defendants herein set forth, confusion has arisen in the minds of the public and will continue to arise and exist, and there is a reasonable liability and likelihood that such confusion will arise and exist; by reason of and as a proximate result of the said acts of said defendants, many of the public will be deceived and misled into believing that defendants’ business is connected or associated with, or under the supervision of plaintiff, and there is a reasonable liability and likelihood that such deception will arise and exist; by reason of the premises and the said acts of said defendants, the trade name, the good-will and the reputation and standing of plaintiff have been and will be irreparably damaged and the trade and business and good-will of plaintiff and the extension and development of its patronage throughout the United States of America and particularly within the State of California, and the City and County of San Francisco, have been and will be irreparably damaged and interfered with.”

11. Amend Finding of Fact No. XII so that said finding shall read as follows:

XII.

“Plaintiff caused demands to be made upon said defendants on May 4, 1945, and again on May 15, 1945, that said defendants desist and

discontinue the use of said trade-name 'Stork Club' and the aforesaid related insignia but the said defendants have continuously neglected, failed and refused to do so." [32]

12. Amend Finding of Fact No. XIII so that said finding shall read as follows:

XIII.

"The name 'Stork Club' was first used at said premises at 200 Hyde Street, San Francisco, on March 1, 1943, by one W. N. Bush; said W. N. Bush, on March 14, 1945, sold and transferred to said defendants the business formerly conducted by him at 200 Hyde Street, together with the liquor licenses appertaining thereto, but did not at said time, or any other time, or at all, sell, transfer or assign said name 'Stork Club' to defendants."

13. Add the following Findings of Fact:

XIV.

"Said defendants, N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara, A. E. Syufy, on March 14, 1945, and continuously thereafter for several months and until the latter part of 1945, were co-partners in the ownership and operation of the aforesaid business at 200 Hyde Street, San Francisco, and immediately thereafter said defendants, Zafer Sahati, Sally Sahati, Edmond Sahati and A. E. Syufy, were, continuously thereafter have been and now are co-partners in said business."

XV.

“The defendants have not given a satisfactory explanation for the choice by them, or any of them, or by their predecessor in interest, of the name ‘Stork Club’ or its related insignia for their place of business.”

XVI.

“The said words ‘Stork Club’ and in its related insignia are purely and entirely fanciful and artificial and in no way descriptive of either the nature, kind or location of said business of said plaintiff.” [33]

XVII.

“The defendants will, unless restrained and enjoined by the above-entitled Court, continue to operate and conduct their aforesaid business under the name of ‘Stork Club’ and will continue to do each and all of the acts and things above complained of; plaintiff has no plain, speedy and adequate remedy at law, and actions at law will not afford plaintiff plain, speedy or adequate remedy for said continuing acts of said defendants, and the remedy hereby sought is necessary to prevent a multiplicity of judicial proceedings.”

XVIII.

“Plaintiff has not given affirmative consent or authority to defendants or any of them to operate a bar, tavern, cocktail lounge or any other business under the name of ‘Stork Club’

or 'The Stork Club' or to use insignia indicating and relating to the same."

XIX.

"Said plaintiff has not been guilty of any laches or delay with respect to the institution of legal action against said defendants, or their predecessor interest, to enjoin the use by said defendants, or said predecessor in interest, of plaintiff's trade-name 'Stork Club' or the aforesaid related insignia."

CONCLUSIONS OF LAW

14. Strike out defendants' Conclusions of Law.

15. Add the following Conclusions of Law:

"The Court has jurisdiction of the subject matter of this action and the parties hereto."

II.

"Plaintiff is the original owner of the trade-name 'The Stork Club' and the related insignia consisting of a stork standing on one leg and wearing a high hat and monocle."

III.

"Plaintiff is entitled to protection against infringement upon plaintiff's trade-name and related insignia, and against the invasion of plaintiff's property rights therein."

IV.

"Plaintiff is entitled to protection against trade practices which do or are likely to in-

fringe unfairly upon plaintiff's use of its trade-name and related insignia."

V.

"Defendants, in adopting and using the name 'The Stork Club' and insignia similar to that adopted by the plaintiff, are guilty of an infringement upon plaintiff's trade-name and related insignia, and of an invasion of the plaintiff's property rights therein."

VI.

"Defendants, in adopting and using the name 'The Stork Club' and insignia similar to that adopted by the plaintiff, are guilty of an unfair trade practice."

VII.

"The plaintiff is entitled to an injunction restraining and enjoining the defendants, and agents, servants, employees and attorneys, and all persons in active concert or participation with defendants, from using in any way, shape or manner upon or in connection with any place of business conducted by or for them, including the place of business located at 200 Hyde Street, San Francisco, California, or in which they are, or any of them is or hereafter may become, interested, and in any and all advertising, printed, written or painted matter, directories and licenses of any description, plaintiff's trade-name 'The Stork Club,' or any name similar thereto, including the name 'Stork Club,' and from using in conjunction with any

such name or independently any insignia similar to or suggestive of that of plaintiff.”

VIII.

“The above injunctive relief is not barred by laches.”

These Proposed Amendments to Defendants’ Proposed Findings of Fact and Conclusions of Law are offered and filed pursuant to Rule 5(e) of the Rules of Practice of the District Court of the United States, for the Northern District of California (effective July 1st, 1944) and to the Rules of Civil Procedure for the District Courts of the United States, and are based upon all of the evidence, oral and documentary, records and files in said action.

Dated: San Francisco, California, this 12th day of April, 1947.

MALONE AND SULLIVAN,
RAYMOND L. SULLIVAN,
Attorneys for Plaintiff.

(Acknowledgment of receipt of copy.)

[Endorsed]: Filed April 12, 1947. [36]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the above-entitled Court, Hon. M. J. Roche presiding, Messrs. Malone & Sullivan appear-

ing as attorneys for plaintiff, and Albert Picard, Esq., appearing as attorney for the defendants, and evidence, oral and documentary, was thereupon introduced on behalf of the plaintiff and defendants, and the matter was submitted to the Court for consideration and decision, and the Court being now fully advised in the premises now makes its findings of fact and conclusions of law, as follows:

Findings of Fact

I.

This Court has jurisdiction of this action. The entire matter in controversy herein is more than the sum of three [37] thousand (3,000) dollars, exclusive of interest and costs.

II.

The plaintiff now is, and continuously since on or about August 15, 1934, has been operating, maintaining and conducting a large restaurant, cafe and night club business under the name "The Stork Club" at No. 3 East 53rd Street, New York City, New York, supplying therein and thereat expensive food, beverage, music and dancing facilities; said plaintiff upon the commencement of said business adopted for the same the trade-name "The Stork Club" and continuously thereafter and since on or about August 15, 1934, has used said trade-name in the conduct and operation of its aforesaid business, and has been and now is the owner of said trade-name "The Stork Club" in the State of New York, but has no right thereto in the State of California.

III.

The plaintiff has expended considerable effort and large sums of money, aggregating in excess of five hundred thousand (500,000) dollars in the last eleven years, advertising in the State of New York; plaintiff employs approximately two hundred forty (240) people to provide several hundred customers each day between 11:30 a.m. and 4:00 a.m. with relatively high-priced and high quality food, beverages and entertainment which service yields an average annual gross income of over one million (1,000,000) dollars; the plaintiff's trade name "The Stork Club" has no value in the State of California.

IV.

The defendants on or about April 6, 1945, began the operation of, and continuously since said date have been operating and conducting a small bar, tavern and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, under the name of "Stork Club" and at all of said times have been and now are using said name in the conduct of said [38] business; that no damage or detriment has been caused to said plaintiff thereby but the gross business of plaintiff has increased over two hundred thousand (200,000) dollars per year for several years last past.

V.

By reason of the aforesaid acts of said defendants no damage has been or will be caused to the trade name, the good-will or the reputation or

standing of plaintiff or to the trade or business or good-will of plaintiff or the extension or development of its patronage throughout the United States of America or within the State of California or the City and County of San Francisco or at all; that plaintiff does not have and is not interested in any place of business within the State of California; that the use of said name "Stork Club" by the defendants does not cause any deception to any person whomsoever and does not cause any person to believe that it is "The Stork Club" operated by the plaintiff or that the plaintiff is in any manner interested in the said small tavern operated by the defendants.

VI.

Plaintiff has not caused a demand to be made upon said defendants that said defendants desist and discontinue the use of said trade name "Stork Club."

VII.

None of the acts and things done or caused to be done by said defendants or any of them has been to the injury or damage of plaintiff in any sum.

VIII.

During all of said time herein mentioned and continuously since on or about August 15, 1934, the plaintiff has used in conjunction with its use of the name, "The Stork Club," in its business, an insignia consisting of a stork standing on one leg and wearing a high hat and monocle. [39]

IX.

By reason of the manner in which plaintiff has been conducting and operating "The Stork Club" as aforesaid, and by reason of the large sums of money expended by plaintiff in advertising and otherwise promoting its said business in the State of New York, the said plaintiff's "The Stork Club" has acquired a widespread and valuable reputation, and has commanded and now commands patronage from visitors to New York from throughout the United States; during all of the time said business has been conducted, the same has been, and now is patronized by visitors to New York both from in and about the City of New York and from the United States at large, including the metropolitan area of San Francisco, California; during all of said time, said business has been and now is patronized by persons of prominence in social, literary, artistic, professional, commercial, official and cinematic circles; on occasions said place of business during all of said time has been, and now is, referred to and written of in various newspapers, magazines and periodicals of local and national circulation; that by reason of the foregoing, the said business of plaintiff conducted and operated under the name "The Stork Club" and with the aforesaid insignia used in conjunction therewith, became and now is known to many persons in and about the City and County of San Francisco, State of California, as a club in New York.

X.

The defendants at all of said times have displayed and maintained, and now are displaying and maintaining a sign affixed to the exterior of said place of business and containing the words "Stork Club," but do not display or maintain any insignia similar to the aforementioned insignia of plaintiff, and consisting of a stork standing on one leg and wearing a high hat; said defendants at all of said times have very slightly advertised their said [40] business in the City and County of San Francisco under the name "Stork Club" and have only caused said business to be listed in the San Francisco telephone directory under said name and reported their business to governmental departments of the State of California and of the City and County of San Francisco as the "Stork Club," and have obtained municipal and State licenses in and under said name; defendants have not caused the aforesaid name "Stork Club" or related insignia, as hereinabove described, to be used in or about the interior of said defendants' place of business or to be advertised or publicized to patrons therein; defendants have never profited and now are not profiting from the aforesaid name or related insignia of plaintiff's business, or at all.

XI.

No confusion has arisen in the minds of the public or will arise or exist and none of the public will be deceived or misled into believing that defendants' business is connected or associated with,

or under the supervision of plaintiff; the trade-name, the good-will and the reputation and standing of plaintiff have not been and will not be in any way damaged by defendants and the trade and business and good-will of plaintiff and the extension and development of its patronage throughout the United States of America have not been and will not be damaged or interfered with, but have steadily and materially increased yearly.

XII.

Plaintiff has not heretofore caused a demand to be made upon said defendants that said defendants desist or discontinue the use of said trade name, "Stork Club" or the aforesaid related insignia.

XIII.

The name "Stork Club" has been used at said premises at 200 Hyde Street by the defendants herein and by the predecessor [41] in interest of said defendants who sold said business to said defendants at all times since the 1st day of March, 1943, and that the said name was publicly and openly displayed on said premises, and that the said plaintiff has been guilty of laches and delay in taking no action of any kind or character whatsoever against said defendants or the predecessor in interest of said defendants for the period of three (3) years from the first use of said name in said premises.

Conclusions of Law

As conclusions of law from the foregoing facts the Court finds that judgment should be entered

that plaintiff take nothing by this action as against defendants or any of them, that an injunction be denied to plaintiff; and that said defendants have judgment against said plaintiff for their costs of suit incurred herein.

Let Judgment be entered in accordance herewith.

Dated: April 28th, 1947.

MICHAEL J. ROCHE,
United States District Judge.

A true copy of the foregoing delivered to the office of Malone & Sullivan, Room 849 Mills Bldg., Attorneys for Plaintiff, on April 8th, 1947.

O. R. CORNISH.

[Endorsed]: Filed April 28, 1947. [42]

In the District Court of the United States, Northern
District of California, Southern Division

No. 25707R

STORK RESTAURANT, INC., a Corporation,
Plaintiff,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SA-
HATI, EDMOND SAHATI, ALFRED AN-
SARA, A. E. SYUFY, FIRST DOE, SEC-
OND DOE, THIRD DOE, FOURTH DOE,
ROE AND ROE, a Co-partnership, BLACK
COMPANY, a Corporation,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial before the above-entitled Court, Hon. M. J. Roche presiding, Messrs. Malone & Sullivan appearing as attorneys for plaintiff and Albert Picard, Esq., appearing as attorney for the defendants, and no other person appearing either in person or by counsel, and evidence, oral and documentary, was thereupon introduced on behalf of the plaintiff and defendants, and the matter was submitted to the Court for consideration and decision, and the Court having made and filed its findings, and good cause appearing therefor;

It Is Ordered, Adjudged and Decreed that the plaintiff take nothing by this action as against the defendants, or any of them, and that an injunction is hereby denied to plaintiff, and that the defendants N. Sahati, Zafer Sahati, Sally Sahati, Edmond [43] Sahati, Alfred Ansara and A. E. Syufy do have and recover from said plaintiff their costs of suit incurred herein amounting to the sum of..... dollars.

Dated: April 28th, 1947.

MICHAEL J. ROCHE,
United States District Judge.

A true copy of the foregoing delivered to the office of Malone & Sullivan, Room 849, Mills Bldg., attorneys for Plaintiff, April 8th, 1947.

O. R. CORNISH.

[Endorsed]: Filed and Entered April 28, 1947.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the plaintiff above-named and to Messrs. Malone & Sullivan, its attorneys:

You Will Please Take Notice that the above-entitled Court has this day entered its judgment in favor of the defendants and against the plaintiff.

Dated: April 28, 1947.

ALBERT PICARD,

Attorney for Defendants N. Sahati, Zafer Sahati,
Sally Sahati, Edmond Sahati, Alfred Ansara
and A. E. Syufy.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed April 30, 1947. [45]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Stork Restaurant, Inc., a corporation, plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment heretofore filed and entered in this action on April 28, 1947.

Dated: May 16, 1947.

MALONE AND SULLIVAN,

/s/ WILLIAM M. MALONE,

/s/ RAYMOND L. SULLIVAN,

Attorneys for Appellant, Stork Restaurant, Inc.,
a Corporation.

[Endorsed]: Filed May 16, 1947. [46]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

Comes now Stork Restaurant, Inc., a corporation, plaintiff above-named, and having filed herein its Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, hereby designates the complete record and all the proceedings and evidence in the above-entitled action as the contents of its record on appeal, including, but not in limitation of the foregoing all pleadings, the findings of fact and conclusions of law, plaintiff's proposed amendments to defendants' proposed findings of fact and conclusions of law, the judgment, all of the evidence received at the trial of said action, including the testimony of the witnesses [47] and all exhibits, and a transcript of the proceedings on the hearing of plaintiff's proposed amendments to defendants' proposed findings of fact and conclusions of law.

Dated: May 16th, 1947.

MALONE AND SULLIVAN,

/s/ WILLIAM M. MALONE,

/s/ RAYMOND L. SULLIVAN,

Attorneys for Appellant, Stork Restaurant, Inc., a Corporation.

[Endorsed]: Filed May 16, 1947. [48]

[Title of District Court and Cause.]

ORDER FOR TRANSPORTATION OF ORIGINAL EXHIBITS TO CIRCUIT COURT OF APPEALS

It appearing to the Court and the Court being of the opinion that, an appeal having been taken in this cause to the Circuit Court of Appeals, the original exhibits filed in this action should be inspected by the Appellate Court and should be sent to the Appellate Court in lieu of copies,

Now, Therefore, upon application of counsel for plaintiff above named,

It Is Ordered that the Clerk of this Court forward to the Circuit Court of Appeals, by means of transportation and in the manner usual and customary for the safekeeping, transportation and return thereof, all of the original exhibits offered, marked and [49] received in evidence upon the trial and hearing of said action, and the whole thereof.

Dated: This 19th day of May, 1947.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed May 19, 1947. [50]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 50 pages, numbered from 1 to 50, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Stork Restaurant, Inc., a corporation, Plaintiff, vs. N. Sahati, et als., Defendants, No. 25707 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 16th day of June, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ M. E. VAN BUREN,
Deputy Clerk. [51]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 25707-R

STORK RESTAURANT, INC., a Corporation,
Plaintiff,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SA-
HATI, EDMOND SAHATI, ALFRED AN-
SARA and A. E. SYUFY,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, April 1, 1947

Appearances:

For the Plaintiff: Raymond L. Sullivan, Esq.

For the Defendants: Albert Picard, Esq.

The Clerk: Stork Restaurant v. N. Sahati, et al.

Mr. Sullivan: Ready.

Mr. Picard: Ready.

Mr. Sullivan: May the record show, if your Honor please, that I am presenting to the Clerk the deposition of Nicholas Michael Sahati which has been taken in this case of Stork Restaurant, Inc., a corporation, v. N. Sahati et al., No. 25707-R, and at the same time the deposition of George A. Smith which has been taken in that case, bearing the same number.

The Court: The record may so show.

Mr. Sullivan: May it please your Honor, this

action is brought by Stork Restaurant to enjoin the defendants, N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara and A. E. Syufy, and their agents, their servants, employees and attorneys and all persons in active concert or participation with defendant from using in any way, shape or manner the name "The Stork Club" or the insignia of the Stork Club which is described in the complaint filed herein and which consists of a stork standing on one leg, and wearing a high hat and monocle.

The action, if your Honor please, is laid in two counts. The first count charges an infringement and invasion of a property right, exclusive right in the name "The Stork Club," and the second count of the complain charges that these defendants have been and now are engaged in unfair trade practice, a count which is predicated upon unfair competition. [2*]

I do not know what the disposition of the Court is with respect to an opening statement, but I may in the interest of time say this briefly to your Honor, that the Plaintiff, Stork Restaurant, Inc., and the evidence will show this, if your Honor please, has been in existence for several years, and since August 15, 1934, it has been using the name "The Stork Club," and it has been using the insignia which I have described to your Honor; in connection with its restaurant, cafe and night club business, it is known as "The Stork Club." It is

*Page numbering appearing at top of page of original Reporter's Transcript.

located at No. 3 East 53rd Street, New York City, New York.

The evidence will show that the Plaintiff has expended considerable effort in the enhancement and in the promotion of its name and its business and its insignia. We will show to your Honor, for instance, that during the period of approximately 11 years, from 1935 to 1945, the sum of \$727,000 was spent in connection with the promotion of its business, the advertisement of its business, the promotion of its name and its insignia, and that it has developed a business, the gross income of which during the same period of time, namely, the 11-year period from 1935 to 1945, aggregates \$9,600,000 approximately.

We will show that because of its promotion that the Stork Club became, as it is commonly called, probably the nation's most famous place of nighttime amusement, or the most famous night club in the United States, and that its name became known to all of the people in the United States and became popularized [3] and known to people throughout the United States and in San Francisco and California.

The evidence will show that as a result the Stork Club acquired a valuable and widespread reputation and it has enjoyed continuously and still does enjoy an extensive patronage from all over the United States, including this area, and its particular patrons are persons of great prominence in the social world, professional and commercial officials, and it has been mentioned many, many times in

various media of advertising such as newspapers, magazines and periodicals and even in motion pictures, and that as a result of this, this name became of a widespread fame and reputation.

If the Court please, the evidence will show that the defendant on April 6, 1945, which was a time approximately nine years after this business had been started by the plaintiff, and after the plaintiff's business had acquired nationwide fame and reputation, with the purpose in mind to benefit and appropriate to himself the trade name and the fame and the good will and extensive reputation of the plaintiff, of the plaintiff's place of business, opened an establishment in this city and called it the Stork Club and they have done business under that name, they have conducted advertising under that name, they have used in a certain way the insignia which I have mentioned to your Honor.

The evidence will show that because of this two things have happened: the defendant has committed an invasion or [4] infringement upon the vested right of the plaintiff, namely, their exclusive right to this name in their business, which is a valuable property right and asset of the plaintiff's business; and secondly, by virtue of the same evidence which will be shown to your Honor, that the defendants have engaged in unfair trade practice.

After we have shown these facts to your Honor, which will be in more detail than I have outlined to your Honor in the interest of time, we will respectfully ask your Honor for an injunction against the

defendants in the manner prayed for in the complaint.

The Court: I will hear from counsel for the defendants.

Mr. Picard: If your Honor please, primarily the statement that the defendant Sahati opened his place of business and used this name is erroneous. They purchased the business with the name which had been used for several years before they purchased the business, and they simply continued to use that name. They did not use the insignia which counsel has mentioned. They, however, used the name Stork Club.

The contentions of the plaintiff here are without merit, particularly for two reasons, if your Honor please. There is a distance of 3,000 miles between the place of business operated by the plaintiff and the place of business operated by the defendants, and by no stretch of the imagination could it be claimed that the place of business used by the defendants is in [5] competition with the plaintiff or in any manner injures the plaintiff.

Furthermore, if your Honor please, from the elaborate and vast amount which has been stated here by counsel, the \$9,000,000 of gross receipts and the \$700,000 and some odd which has been spent in advertising, it is obvious that it is a fairly large and elaborate place of business, and what is commonly called a night club. The place of business conducted by defendants is a comparatively small bar and restaurant. It is at 200 Hyde Street in San Francisco. It is a comparatively small place

of business and is not in any manner in competition with plaintiff in this case.

There is no entertainment. The place is just a comparatively small place and seats a comparatively small number of persons and is mainly operated as a bar.

We submit, if your Honor please, that the complaint does not show any invasion of the plaintiff's name. The stork is the name of a bird. There is not unfair competition and there is nothing here, if your Honor please, in which the plaintiff could show any injury or any reason why the defendants should be enjoined from using the name.

The Court: We will take a brief recess.

(Recess.)

The Court: Proceed with the case.

Mr. Sullivan: May it please the Court, at this time [6] plaintiff offers in evidence and introduces as the testimony of the first witness in this case, the testimony of John J. Farrell which was taken pursuant to notice in New York City beginning on October 2, 1946 at 2:00 p. m., before Louis G. Schwartz, a Notary Public.

The title page of the deposition, if your Honor please, shows that Malone & Sullivan, Esquires, 849 Mills Building, San Francisco, 4, California; and Goldwater & Flynn, Esquires, Monroe Goldwater, Esq., and Louis R. Colman, Esq., appeared as attorneys for the plaintiff Their address is 60 East 42nd Street, New York, N. Y.

Frank, Weil & Strouse, Esquires, by Samuel F.

Frank, Esq., 8 West 40th Street, New York, N. Y., appeared as attorney for the defendants.

The plaintiff, the Stork Restaurant, a corporation, at this time offers this testimony, by offering to read into evidence the deposition of the witness John J. Farrell. I do not think that it will be necessary, will it, Mr. Picard, to read the preliminary statement on Page 2?

Mr. Picard: No, that is not necessary.

Mr. Sullivan: I will begin, if your Honor please, with the first question:

DEPOSITION OF JOHN J. FARRELL

By the Notary:

“Q. Please state your name and address.

“A. John J. Farrell, 550 Linden Avenue, Teaneck New Jersey. [7]

“Direct Examination

“By Mr. Goldwater:

“Q. Mr. Farrell, are you connected with the Stork Restaurant, Inc., the plaintiff in this cause?

“A. Yes, I am.

“Q. What office do you hold in that company?

“A. I am president of Stork Restaurant, Inc., and the auditor.

“Q. How long have you been the auditor for Stork Restaurant, Inc.? A. Since 1935.

“Q. As such auditor, are the books of the corporation under your direct supervision?

“A. Yes, they are.

“Q. Are all entries and records made of the

(Deposition of John J. Farrell.)

business of the Stork Restaurant, Inc. in books which are regularly kept? A. Yes.

“Q. What are the books in general, and describe them as to name?

“A. General ledger, purchase journal, petty cash book, cash receipts book, cash disbursements book and earnings book.

“Q. Are the books and records containing such entries as to which you will be asked to testify, in accordance with the information which I previously furnished you, here present at this hearing? [8]

“A. The general ledgers are.

“Q. What do those general ledgers contain; what kind of record and entry?

“The general ledgers contain the total of the various books of original entry.

“Q. Where are the books of original entry?

“A. They are at the Stork Restaurant, Inc., and some are in the warehouse.

“Q. If any of these books are required for examination by defendants' counsel, can they and will they be produced here? A. Yes.

“Q. How long did you say you have been associated with the Stork Restaurant as its auditor?

“A. Since 1935.

“Q. You have been in charge of the books and records of the company since that date?

“A. Yes, sir.

“Q. Are all of the entries in these books and records in your own handwriting?

“A. No, they are not all in my handwriting, but they have been made under my supervision.

(Deposition of John J. Farrell.)

“Q. Are you thoroughly familiar with them?

“A. Yes, I am.

“Q. In accordance with the regular customary practice of accounting, are those books and records a correct reflection of [9] the business conducted by the Stork Restaurant during that period?

“A. They are.

“Q. Let me ask you, first, whether correct records and entries are kept in the books, which you have described, for advertising expenses of all kinds during the period you described?

“A. They are.

“Q. Have you examined those books and records for the purpose of determining the approximate total amount which has been spent by the Stork Restaurant, Inc. during the period from 1935 through the year 1945? A. Yes, I have.

“Q. Will you tell us, first, what the total sum is, which has been spent for that purpose, during that period? A. \$727,582.59.

“Q. Are your work sheets, upon which you have entered these totals and calculated the aggregate amount, present here subject to examination?

“A. They are.

“Q. Will you break down that total with respect to the kinds of items which enter into this advertising expense?

“A. You mean, year by year?

“Q. First, give us in general the headings of the kinds of items.

“They would consist of gifts and matches and

(Deposition of John J. Farrell.)

jewelry of [10] all sorts of items that we have given to our patrons, and also some of it is free meals.

“Q. That is, some of it comprises those cases in which, as a matter of advertising or good will, patrons of the Stork Club are treated as guests of the Stork Club?

“A. The management sometimes acts as host to newspaper people and celebrities.

“Q. Celebrities in what fields of activity?

“A. In the amusement field, industrial, theatrical.

“Q. Does that include, also, persons who are prominent in the social world?

“A. Yes, people who are mentioned socially all through the newspapers and magazines.

“Q. Has it been the policy of the Stork Restaurant throughout these years, on frequent occasions, to make such persons the guests of the Stork Club?

“A. Yes.

“Q. Have you separated the amounts which which have been expended by the Stork Club for these various purposes, so that you can give us from your collation of the items the total number of items with the description of the character of the items, and also the total amount spent for each of the items?

“A. Yes. I have a schedule here of the number of items and the amount expended for them.

“Q. Have you taken the figures from the account books and [11] records of the Stork Restaurant, Inc., which you described?

(Deposition of John J. Farrell.)

“A. I have.

“Q. Are you able to break down those items for each of the years from 1935 through the year 1945? A. Yes.

“Q. Will you tell me, now, what the fiscal year of the Stork Restaurant, Inc. is?

“A. December 1st to November 30th.

“Q. Let us take the year 1935. Would that be the year ending December 1st or November 30, 1936? Is that the year you would call ‘1935’ or is that the year you would call ‘1936’?

“The year ending November 30, 1935 we call ‘1935.’

“Q. Will you give us, for the year 1935, the total amount spent for the purposes which you have described and such breakdown into various classifications as you can furnish?

“Not for 1935; I cannot give it to you; and I cannot for 1936.

“Q. You have only the totals for those years?

“A. Yes.

“Q. Would you state what the totals are?

“A. \$84,930.38 for 1935.

“Q. That is the year ending November 30, 1935?

“A. Yes, and for the year ending November 30, 1936, \$106,197.89.

“Q. Can you break down into separate groups the total [12] amount for each of those years?

“A. Yes.

“Q. Into two general groups?

“A. Yes, into two general groups.

(Deposition of John J. Farrell.)

“Q. What are those groups, and the amounts of each?

“A. House advertising, \$51,794.58, and cash advertising, \$33,135.80, for the year ending November 30, 1935; and for the year ending November 30, 1936, house advertising is \$58,715.02, and the cash advertising \$47,482.87.

“Q. Will you tell us what items in general are comprised under the heading of ‘house advertising’?

“A. On the item ‘house advertising’ under that there were included food and liquor that was given away at that time.

“Q. You mean that would be the total of the items at the regular list price of the Stork Club for those persons who were entertained as a matter of policy at the Stork Club during that period?

“A. During that period, that is, for the first two years that we were open, and that was our policy at that time.

“Q. Will you tell us what items are comprised under the heading of ‘cash advertising’?

“A. Gifts to customers, flowers, post-cards, postage—any number of things that were given away at different times throughout those years.

“Q. Postage was not given away, of course. Describe what [13] the postage was used for.

“A. Postage was used to take care of our mailing list.

“Q. Mailing list of patrons or prospective patrons?
A. Mailing list of patrons.

(Deposition of John J. Farrell.)

“Q. What names were on those lists; how were those lists compiled?

“A. Those lists were compiled from our record of mailing list which is taken from our guests; names and addresses of our guests who had patronized the club.

“Q. Was the book known as the Social Register also used in your mailing list?

“A. Yes, the Social Registers were also used.

“Q. What kind of material was mailed to those persons?

“A. Postal cards and magazine articles. We did get out a few magazines.

“Q. What do the postal cards show; what was portrayed on them?

“The new Cub Room that we opened, the new Blessed Event Room, the new Tap Room and, of course, different announcements as to cocktails, cocktail hours.

“Q. The Cub Room was not opened as early as this period in 1935 and 1936? A. No.

“Q. Nor the Blessed Event Room at that time?

“A. No. [14]

“Q. Were there photographs, reproductions of photographs of persons in various parts of the Stork Club? A. Yes.

“Q. By the way, I did not ask you by what name is the establishment operated by the Stork Restaurant, Inc., commonly known in New York?

“The Stork Club.

“Q. Is it known by that name outside of the City of New York as well?

(Deposition of John J. Farrell.)

“A. Yes, it is known all over the world as the Stork Club.”

Mr. Picard: Just a minute. I move that that be stricken on the ground it is pure hearsay. This witness is in no position to know whether anything is known all over the world or not.

Mr. Sullivan: I resist the motion, if your Honor please, on the ground that the witness is president of the Stork Restaurant, Inc. and the auditor. He has had personal knowledge of the activities of the Stork Restaurant since 1935 and he is in a position from dealing with the various patrons who have come from all over the world to indicate what is the general fame and reputation of this place.

The Court: It is calling for the conclusion of the witness. However, I will allow it to go subject to your motion to strike over your objection.

Mr. Sullivan (continuing): “Q. Has it always been known [15] by that name since the opening of the establishment? A. Yes.

“Q. Will you give us the address at which the business is conducted?

“A. At 3 East 53rd Street, New York City. That was at the address at the time the business was started there, at the time the Stork Restaurant, Inc., went into business. Since that time the address has been 3 East 53rd Street.

“Q. Have additional premises been added to the operations adjoining 3 East 53rd Street since that time?

“A. Yes, there has, and we have taken over part of No. 1 East 53rd Street.

(Deposition of John J. Farrell.)

“Q. What part of 3 East 53rd Street was occupied by the Stork Restaurant for its business since 1935?

“A. 3 East 53rd Street, the first floor and basement and, of course, there were offices upstairs.

“Q. Do I understand that the Stork Restaurant used the first floor, that is, the street floor, for the entertainment of its patrons? A. Yes.

“Q. And the basement was used for what purpose?

“A. For kitchen and storage of supplies.

“Q. And the first floor above the street floor was used for what purpose?

“Office and dressing rooms. [16]

“Q. That has been so since 1935, has it?

“A. Yes.

“Q. When it acquired No. 1 East 53rd Street for its use, what portion of those premises was used by the Stork Restaurant, Inc.?

“A. The first floor and mezzanine and part of the basement.

“Q. When you say “first floor” in this instance, do you refer to the first floor above the street?

“A. The ground floor.

“Q. It would be the ground floor, mezzanine and part of the basement? A. Yes.

“Q. What part of those premises was used for entertainment of patrons?

“A. The ground floor.

“Q. Is there an opening between No. 1 East 53rd Street and No. 3 East 53rd Street, and has there

(Deposition of John J. Farrell.)

been such opening since No. 1 East 53rd Street was acquired for use? A. There has.

“Q. Is the mezzanine in No. 1 East 53rd Street also used for the entertainment of patrons?

“A. Yes. It is known as the Blessed Event Room.

“Q. Would you tell us now the total number of persons who may be seated in the various portions of the premises, that is, in the public group, seated in accordance with the appropriate [17] or applicable department regulations of the City of New York? A. The total is 438.

“Q. Can you break that down into the various portions of the premises?

“A. Yes. The main room, 300 persons.

“Q. The main room is at which address?

“A. 3 East 53rd Street; the Cub Room, which is at 1 East 53rd Street, 74 persons; the Loners' Room, which is also at 1 East 53rd Street, 24 persons; and the Blessed Event Room at 1 East 53rd Street, 40 persons.

“Q. That is the maximum seating capacity as permitted by the ordinances and regulations of the City of New York?

“A. Yes, that is correct.

“Q. Now, Mr. Farrell, you gave us the two general headings under which you could divide this publicity and advertising expense for the years 1935 and 1936. For the years 1937 to 1945, inclusive, are you able to break these items down into more detailed headings? A. Yes.

(Deposition of John J. Farrell.)

“Q. Have you with you the work sheets upon which you have entered the totals which you computed on each of the items of expenditures for those purposes during those years showing the total number of items of each character, and the total amount expended for each character?

“A. I have the total amount of each character and the [18] total amount expended. There are some items, of course, which are not included in here, such as flowers and other gifts that I don't have the bills for, and didn't come across the bills, but I have the majority of them.

“Q. As to each of the items concerning which you are now able to give us the descriptive title and the total amount expended in each of the years, have you present here the bills supporting your statement with respect to the cost and the character of the items? A. I have.

“Q. Those are receipted bills showing payments for each of these items?

“A. They are not receipted bills.

“Q. Do you know that all of these bills were paid of your own knowledge? A. I do.

“Q. Is it one of your duties to retain the record of the bills paid, and also to prepare the check for payment of each of these items?

“A. It is my duty to record the check and cash disbursements book showing payment of the items.

“Q. Do you know that all of these checks were cleared through the regular bank channels and re-

(Deposition of John J. Farrell.)

turned to the Stork Restaurant, Inc., by its bank?

“A. Yes, I do. [19]

“Q. Are those two yellow sheets, which you now hand me, Mr. Farrell, the statement of the records, the total of each of the items of expenditure showing the character, the total number of items and the total amount paid therefor, from the years 1937 through to year ending November 30, 1945, inclusive?

“A. They are the totals for the amount of bills I have brought down.

“Q. You have the bills for each of these items?

“A. Yes.

“Mr. Goldwater: I ask that these be marked for identification.

“(Two large yellow sheets thereupon marked respectively Plaintiffff’s Exhibits 1 and 1-A for Identification, 10/2/46.)”

At this time, if your Honor please, plaintiff offers in evidence two yellow sheets which bear the mark, Plaintiff’s Exhibit 1 for identification, with the date October 2, 1946, and Plaintiff’s Exhibit 1-A for identification, which bears the date October 2, 1946, and each of them having what purports to be the reporter’s signature identifying the exhibit marked. I offer each of these in evidence and ask that they be duly admitted and marked with the same numbers, namely, Plaintiff’s Exhibit in evidence 1 and Plaintiff’s Exhibit in evidence 1-A, as they have been in the deposition.

(Deposition of John J. Farrell.)

The Court: They may be admitted and marked.

(Two large yellow sheets were marked Plaintiff's Exhibit 1 [20] and Plaintiff's Exhibit 1-A.)

Mr. Sullivan: Now resuming the reading of the deposition:

"Mr. Goldwater: I offer, for the inspection of counsel for defendants, files containing bills supporting the payments for each of the purposes and to each of the payees, indicated on Plaintiff's Exhibits 1 and 1-A for identification.

"Mr. Frank: At the present time I do not want to examine the records, but you have them here and at any time a question is raised about them, you will give me an opportunity to verify them.

"Mr. Goldwater: I offer for identification the files containing the bills referred to by the witness from which he states he made up the total of items and amounts expended for the various purposes described, as set forth in Plaintiff's Exhibits 1 and 1-A for identification.

"(Said files, referred to, comprising a batch of papers, thereupon marked Plaintiff's Exhibit 2 for identification, 10/2/46.)"

I will show Mr. Picard Plaintiff's Exhibit 2 for identification, which consists of 86 folders of bills, beginning with the mark of Exhibit 2 for identification. Folders of bills beginning with the mark of Exhibit 2 for identification and running completely

(Deposition of John J. Farrell.)

through the alphabet, consecutively from 2-A to 2-HHHH.

Mr. Picard: I think I will follow the course followed by [21] my associate, Mr. Frank, and say I will examine them at a later time.

The Court: They may be admitted and marked.

Mr. Sullivan: At this time, if your Honor please, I offer these files which consist of 86 folders of bills that I have mentioned to your Honor as Plaintiff's Exhibit next in order and ask that they be marked as one exhibit, namely, from Plaintiff's Exhibit 2-A to 2-HHHH, using in each instance upon each exhibit for identification the number of the exhibit in evidence.

The Court: They may be admitted and marked.

(The files containing bills are marked Plaintiff's Exhibit 2-A to 2-HHHH.)

Mr. Picard: I will stipulate that the Clerk may initial the top sheet and that all the rest are deemed as being marked.

Mr. Sullivan (reading):

"Mr. Goldwater: These supporting bills will be available for inspection by counsel for defendants at his request at any time.

"Q. Now, Mr. Farrell, so that the record will be clear, apart from the exhibit, will you read into the record the total number of items and total expended for each item for the period 1937 to 1945, inclusive?

"A. There were 260 clip watches—

(Deposition of John J. Farrell.)

“Mr. Frank (to witness): The totals you are going to give comprise these two general groups you gave us before, one for [22] gifts, and the other for cash expenditures, and you will subdivide those. Are there other items besides the ones you gave?”

“The Witness: These items are for cash expended.

“Mr. Frank: That is one of the items?”

“The Witness: Yes.

“Mr. Frank: These figures give the details as to these two general groups?”

“Mr. Goldwater: As to only one of the groups.

“The Witness: The cash.

“Mr. Frank: I want to know what they are.

“By Mr. Goldwater:

“Q. This is the breakdown which you are able to give in detail for the period from 1937 to 1945, inclusive? A. That is correct.

“Q. It does not include the figures which you gave for 1935 and 1936 under the two general headings? A. No, it does not.

“Q. Now, will you give us those?”

“A. 260 clip watches, \$2640; 4878 key tags, \$802.43; 400 radios, \$4840; 15,700 calendars, \$2305.20; 3975 decks of playing cards, \$1012.99; 160 fountain pens, \$2153.50; 42 alligator bags, \$2612.29; 17,624 lipsticks, \$5827.80; 2108 compacts, \$4216; 86,000 paper cigarette holders, \$818.75; 221,500 “Stork Talk”, \$6163.02; 658,350 postal cards, \$3051.80—that item does not comprise the entire amount. Also, 4503 ties and [23] scarfs,

(Deposition of John J. Farrell.)

\$22,256.01; 2716 auto plates, \$911.30; 22,229 bottles of perfume, \$102,549.54; 639,923 lucky coins, \$11,693.50; 6,983,750 packages of book matches, \$18,095.42; 26,608 articles of jewelry amounting to \$9,969.36.

“Q. Under the various categories, that you have just described, Mr. Farrell, are there any one or more of those figures which do not cover the full period of 1937 to 1945?

“A. The postal cards do not.

“Q. How many years, and what was the total of postal cards?

“A. 658,350 represented the period of two years, but I would say we did average about 200,000 postal cards a year.

“Q. Are you sure there was a minimum of 200,000 in each of the other years?

“A. There was a minimum of at least 200,000 in each of the other years.

“Q. Which of the two years have you gotten the accurate figure on which you testified?

“A. They are both 1940, as to these items.

“Q. You mean, that is the total used in one year? A. In one year, yes.

“Q. Are you able to say that there was a minimum of 200,000 used in each of the other years?

“A. Yes.

“Q. That is, between 1937 and 1945?

“A. Yes, that is correct. [24]

“Q. Now, Mr. Farrell, I show you a circular metal piece with an insignia on it, and the name

(Deposition of John J. Farrell.)

“Stork Club,” and ask you whether that is the form of the insignia and the form of the type of letters for the name, which has been commonly used by the Stork Restaurant for the advertising and publicity of its club known as the Stork Club since 1935? A. It is.

“Mr. Goldwater: I ask that be marked for identification.

“(Item, being circular metal piece referred to, thereupon marked Plaintiff’s Exhibit 3 for identification, 10/2/46.)”

Now I will show Mr. Picard Plaintiff’s Exhibit 3 for identification (handing it).

At this time, if your Honor please, we offer in evidence Plaintiff’s Exhibit 3 for identification which bears the Reporter’s signature and the date October 2, 1946, and ask that it be duly admitted and marked Plaintiff’s Exhibit No. 3.

The Court: It may be admitted and marked.

(The circular metal piece is marked Plaintiff’s Exhibit 3.)

Mr. Sullivan (reading):

“Q. What is the article which has just been marked as Plaintiff’s Exhibit 3 for identification?

“A. Auto plate.”

May I interrupt at this time and address the Court so that the record will be clear. I think it is probably clear that I have brought to the Court today all of the exhibits for [25] identification

(Deposition of John J. Farrell.)

which were introduced at the deposition. They were sent to me by counsel in New York.

I will resume the reading of the deposition.

“Q. Is that the item to which you have testified that 2716 such items, at a total cost of \$911.30, were purchased? A. It is.

“Q. Do you know what was done with this?

“A. Yes. They were circulated among our guests to be put on the back of their cars over their license number.

“Q. This insignia of the Stork standing upon one leg with a silk hat and monocle with the name on it also bears the letters “NYC” and I ask you whether the insignia, as commonly used by the Stork Club on its various articles described as gifts for advertising and publicity purposes, always used the letters “NYC”? A. Yes.

“Q. On all of them, did you always use “NYC”?

“A. On most of our gifts—most of our advertising matter, such as matches and name plates.

“Q. On many of your gifts, such as the stork pins and the powder cases and other things, did the address appear on them, or the city?

“A. On the stork pins, you mean?

“Q. Yes. A. No. [26]

“Q. We will see, as we go along, on which ones it did appear and on which it did not. What is the first item on the list which you just read into the record? A. Clip watches.

“Q. Have you any clip watches left which can be identified? A. No, I have not.

(Deposition of John J. Farrell.)

“Q. Could you describe them, generally?”

“A. Yes. It was a watch similar to a lady’s clip pin that they pin on their dress.

“Q. That is a small watch?”

“A. A small watch.

“Q. For ladies’ use?”

“A. Yes, and they also had the stork emblem.

“Q. The emblem you describe what I have referred to as an insignia on Plaintiff’s Exhibit 3 for identification? A. That is correct.

“Q. What is your next item?”

“A. Key tags.

“Q. I show you this article and ask you if that is a correct sample, an identical sample, of the key tags of which you have said 4,878 items, at a cost of \$802.43, were purchased?”

“A. That is correct.

“Mr. Goldwater: I ask that be marked for identification.

“(Key tag, referred to, thereupon marked Plaintiff’s Exhibit 4 for identification, 10/2/46.)” [27]

I am now showing Mr. Picard Plaintiff’s Exhibit No. 4 for identification (handing).

I offer Plaintiff’s Exhibit No. 4 for identification in evidence and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The key tag marked Plaintiff’s Exhibit 4.)

Mr. Sullivan: Now resuming the reading of the deposition:

(Deposition of John J. Farrell.)

“Q. Will you tell me, Mr. Farrell, what was done with the key tag?

“A. They were also distributed among our guests and patrons.

“Q. What is your next item? A. Radios.

“Q. I show you this article and ask you whether this is an identical sample and one of the items which you have described as 400 radios at a cost of \$4840? A. It is.

“Mr. Goldwater: I offer that for identification.

“(Radio, referred to, thereupon marked Plaintiff’s Exhibit 5 for identification, 10/2/46.)”

Mr. Sullivan: At this time, if your Honor please, I will show Mr. Picard Plaintiff’s Exhibit No 5 for identification (handing).

I offer Plaintiff’s Exhibit 5 for identification in evidence and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The radio was marked Plaintiff’s Exhibit 5.)

I now resume reading of the deposition:

“Q. Will you tell me what was done with those 400 items?

“A. They were distributed among our patrons.

“Q. What is your next item?

“A. Calendars.

“Q. I show you this frame, Mr. Farrell, which encloses a lithograph bearing the name “The Stork Club,” and 12 reproductions of photographs with

(Deposition of John J. Farrell.)

the month of September 1941, and ask you if that is a sample, identical with the 15,700 items, which you have described as calendars purchased by the Stork Club, at a cost of \$2305.20?

“A. Yes, that is correct.

“Mr. Goldwater: I offer that for identification.

“(Frame bearing the name “The Stork Club,” etc., thereupon marked Plaintiff’s Exhibit 6 for identification, 10/2/46.)”

I am showing it to Mr. Picard (handing).

I offer Plaintiff’s Exhibit 6 for identification, which is referred to in the deposition, in evidence, if your Honor please, and ask that it be admitted and marked as Plaintiff’s Exhibit 6 in evidence.

The Court: It may be admitted and marked.

(The frame bearing name “The Stork Club” was marked Plaintiff’s Exhibit 6.)

I now resume the reading of the deposition: [29]

“Q. Will you tell us what was done with these calendars?

“A. They were distributed amongst our patrons.

“Q. What is your next item on the list, Mr. Farrell? A. Playing cards.

“Q. I show you two boxes containing playing cards and ask you if they are identical with the 3975 items of playing cards purchased by the Stork Club at a cost of \$1012.99? A. They are.

“Mr. Goldwater: I ask they be marked for identification.

“(Two boxes containing playing cards thereupon

(Deposition of John J. Farrell.)

marked Plaintiff's Exhibit 7-A and 7-B for identification, 10/2/46.)”

If your Honor please, I have Plaintiff's Exhibit 7-A and 7-B for identification which I am showing to Mr. Picard.

At this time the Plaintiff offers in evidence Exhibit 7-A and 7-B for identification and asks that they be duly admitted and marked as Exhibit 7-A and 7-B in evidence, respectively.

The Court: They may be admitted and marked.

(Two boxes containing playing cards were marked Plaintiff's Exhibit 7-A and 7-B.)

Mr. Sullivan: Might I call to your Honor's attention that we have opened the packages or boxes of cards which appear to be playing cards with the words "Stork Club" and the insignia consisting of the stork standing on one leg, with a high hat on the back of the playing card.

Now resuming the reading of the deposition, if your Honor [30] please:

“Q. Will you tell us what was done with those 7000-odd items?

“A. They were distributed among our patrons.

“Q. What is your next item?

“A. 160 fountain pens.

“Q. Have you any samples of these fountain pens? A. No, we do not.

“Q. Can you tell us what year they were purchased in? A. They were purchased in 1945.

“Q. Was the pen made of silver? A. Yes.

(Deposition of John J. Farrell.)

“Q. What type of pen was it? Do you know the manufacturer?

“A. Known as the Reynolds Pen.

“Q. From whom were they purchased?

“A. 122 pens were purchased from Gimbel Brothers, and 38 pens were purchased from the Parker Pen Company.

“Q. Did the pen have engraved upon it the name “Stork Club”?

“A. The Reynolds pens did.

“Q. But the Parker pen did not?

“A. No, the Parker pen did not.

“Q. What happened to those pens?

“A. Those pens were distributed among our patrons.

“Q. What is the next one? [31]

“A. Alligator bags.

“Q. How many items of alligator bags were purchased? A. Forty-two.

“Q. At what cost?

“A. At a cost of \$2612.29.

“Q. Have you any samples or have you one of those items in your possession?

“A. No, I don't.

“Q. The Stork Club has not?

“A. The Stork Club has not.

“Q. What happened to them?

“A. They were distributed among our patrons.

“Q. Can you tell us from whom they were purchased?

“A. They were purchased from Koret.

(Deposition of John J. Farrell.)

“Q. Do you have the bill for those items present here? A. Yes, the bill is here.

“Q. What is the next item?

“A. Lipsticks, 17,624.

“Q. I show you an item and ask you if that is identical with, or one of, the 17,624 lipsticks which were purchased by the Stork Club at a cost of \$5827.83 during the period mentioned?

“A. It is.

“Mr. Goldwater: Mark that for identification.

“(Sample of lipstick thereupon marked Plaintiff’s Exhibit [32] 8 for identification, 10/2/46.)”

I have here, if your Honor please, the lipstick which is marked Plaintiff’s Exhibit No. 8 for identification and I now show it to Mr. Picard.

I offer Plaintiff’s Exhibit 8 for identification in evidence and ask that it be duly marked, as Plaintiff’s Exhibit No. 8 in evidence.

The Court: It may be admitted and marked.

(Sample of lipstick marked Plaintiff’s Exhibit 8.)

Mr. Sullivan: If your Honor please, Mr. Picard has told me that he would not require me to bring in editions of the San Francisco Call-Bulletin, and I have had photostatic reproductions of them made. Now will you stipulate, or will you give some thought to this, Mr. Picard, that we can introduce the photostatic reproductions of those pages with the stipulation that they are reproductions of those

(Deposition of John J. Farrell.)

portions of the San Francisco Call-Bulletin and that that newspaper was distributed in this area.

Mr. Picard: I will go that far, that is to say, that the photostats may be produced with the same force and effect as the originals without conceding, of course, that the originals would be admissible until after I have seen them. But I will not require counsel to bring pages from the newspapers or the entire papers or anything like that because there is no use in wasting your Honor's time. [33]

Mr. Sullivan: Mr. Picard, I have the same situation relating to magazines which are known to you, probably, like American, Collier's, and I will be glad to show them to you, and probably we could make some agreement as to them.

Mr. Picard: Yes, that is agreeable.

The Court: We will take a recess now.

(Thereupon a recess was taken until 2 p.m.)

Afternoon Session, 4/1/47, 2:00 P.M.

Mr. Sullivan: May I proceed, your Honor?

The Court: Yes.

If your Honor please, I will continue reading the deposition of the witness John J. Farrell.

"Q. What is your next item?

"A. Compacts, 2108.

"Q. I show you this article and ask you if this is a sample of the 2108 compacts which were purchased by the Stork Restaurant at a cost of \$4216?

"A. It is.

"Mr. Goldwater: Mark that for identification.

(Deposition of John J. Farrell.)

“(Sample of compact thereupon marked Plaintiff’s Exhibit 9 for identification, 10/2/46.)”

Mr. Sullivan: At this time, if your Honor please, I will show Mr. Picard Plaintiff’s Exhibit 9 for identification which is mentioned in the deposition (handing).

Plaintiff offers Plaintiff’s Exhibit 9 for identification in evidence as Plaintiff’s Exhibit 9.

The Court: It may be admitted and marked.

(Sample of compact is marked Plaintiff’s Exhibit No. 9.)

Mr. Sullivan: Resuming the reading of the deposition:

“Q. What was done with those compacts, Mr. Farrell?”

“A. Those compacts were distributed among our patrons.

“Q. What is your next item? [35]

“A. Cigarette holders.

“Q. I show you an article and ask you if this is a sample of the cigarette holders, of which you said the Stork Club purchased 86,000 at a cost of \$818.75?”

“A. That is one of them.

“Mr. Goldwater: Mark that for identification.

“(Sample of cigarette holder thereupon marked Plaintiff’s Exhibit 10 for identification, 10/2/46.)”

I will at this time show Mr. Picard Plaintiff’s

(Deposition of John J. Farrell.)

Exhibit No. 10 for identification which I have produced here in court (showing).

The Plaintiff offers Plaintiff's Exhibit 10 for identification in evidence and asks that it be admitted and marked.

The Court: It may be admitted and marked.

(Sample of cigarette holder marked Plaintiff's Exhibit 10.)

Mr. Sullivan: Resuming the reading of the deposition:

"Q. What is your next item?

"A. 'Stork Talk' pamphlet.

"Q. I show you an eight-page pamphlet containing photographs and underwritings and ask you if that is one of the 221,500 items you have described at 'Stork Talk' printed by the Stork Club at a cost of \$6163.02? A. It is.

"Mr. Goldwater: Mark that.

"(Eight-page pamphlet entitled 'Stork Talk' thereupon [36] marked Plaintiff's Exhibit 11 for identification, 10/2/46.)"

At this time I will show Mr. Picard Plaintiff's Exhibit No. 11 for identification which is marked October 2, 1946, and entitled "Stork Talk," (showing).

The Plaintiff offers Plaintiff's Exhibit No. 11 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Deposition of John J. Farrell.)

(Eight-page pamphlet entitled "Stork Talk" is marked Plaintiff's Exhibit No. 11.)

Mr. Sullivan: Resuming the reading of the deposition.

"Q. Was it the policy and purpose of the Stork Club to reproduce in 'Stork Talk' pictures of persons prominent in the social and theatrical and industrial world as they appeared at various times at the Stork Club? A. It was.

"Q. What was done with those copies of 'Stork Talk'?

"A. They were mailed to our patrons.

"Q. Did you supervise the mailing?

"A. I did.

"Q. Was it done in the office of which you have charge? A. Yes.

"Q. And done under your direction?

"A. Yes, under my direction.

"Q. What is your next item? [37]

"A. Post cards.

"Q. I show you a post card and ask you if this is one of the items which you described as 658,350 post cards purchased by the Stork Restaurant at a cost of \$3051.87?

"A. That card is not one of the cards which is included in the 658,360.

"Q. Is this a card identical with another number of cards which were also sent? A. It is.

"Q. Sent to whom?

"A. To our patrons, on the mailing list.

(Deposition of John J. Farrell.)

“Q. Have you a sample of one of the 658,350 cards which you described?

“A. No, I have not, but there is a replica on the calendar that I mentioned before, of that card.

“Q. You mean that the cards or reproductions of the photographs of the various women who appear in a number of the reproductions, in Exhibit 6 for identification? A. Yes.

“Q. Do you know what photographs they represent?

“A. They are photographs of models of famous artists.

“Q. Are they reproductions of photographs, or are they photographic reproductions of original drawings?

“A. They are photographic reproductions of the original drawing. [38]

“Q. Do you know by name some of the artists who produced these original drawings, or some of them?

“A. William Arthur Brown, I believe, was one; James Montgomery Flagg, Dean Cornwall, Gilbert Bundy, John LaGatta, Russell Patterson, and others.

“Q. What did you say was done with these cards?

“A. They were mailed to our patrons.

“Q. What is your next item?

“A. Ties and scarfs.

“Q. Have you any sample of the ties and scarfs

(Deposition of John J. Farrell.)

that were purchased, which you described in the list of items which you read into the record?

“A. No.

“Q. Do you know from whom those ties were purchased?

“A. They were purchased from Budd, Ltd., and DePinna.

“Q. Are those both retail department stores in the City of New York? A. They are.

“Q. Do any of them bear the insignia or the name ‘Stork Club’?

“A. Some of the ties did.

“Q. Were there any substantial number of them?

“A. I cannot say the exact number.

“Q. All of them did not?

“A. All of them did not, no. [39]

“Q. What was done with those ties?

“A. They were distributed among our patrons.

“Q. That is, as gifts? A. As gifts.

“Q. What is your next item?

“A. Perfume.

“Q. Have you a sample of the perfume that was distributed, and of which you have said there were 22,229 items purchased at a cost of \$102,549.54, during the period mentioned?

“A. No, I have not.

“Q. Did any or all of those items bear the name or the insignia of ‘Stork Club’?

“A. Some of the items did bear the name of ‘Stork Club.’

(Deposition of John J. Farrell.)

“Q. Can you tell us from whom those items were purchased?

“A. They were purchased from Esme of Paris, Parfum Charbert, Parfum Corday, The Caron Corporation, Schiaparelli, Scheherezade, Chanel, Parfum Melora, Lucien LeLong, Lynette, Gean Nate, Fred Lunning and Elizabeth Arden.

“Q. Have you the bills of the items so purchased from each of these manufacturing and distributing concerns, whom you have mentioned?

“A. Yes.

“Q. Are they present for examination by defendants' counsel, if he wishes to do so?

“A. Yes. [40]

“Q. You know all these bills were paid and they aggregate in total \$102,549.54?

“A. That is correct.

“Q. What was done with all of those items?

“A. They were distributed among our patrons.

“Q. What is your next item?

“A. Lucky coins.

“Q. I show you here two articles and ask you if these are identical with the items which you have described as 639,923 lucky coins purchased by the Stork Restaurant, Inc., at a cost of \$11,693.50?

“A. They are.

“Mr. Goldwater: I ask they be marked for identification.

“(Lucky coins referred to, thereupon marked

(Deposition of John J. Farrell.)

Plaintiff's Exhibit 12-A and 12-B for identification, 10/2/46.)”

Now I will show Mr. Picard Plaintiff's Exhibit No. 12-A and 12-B for identification which are produced here in court (showing).

Plaintiff at this time, if your Honor please, offers in evidence Plaintiff's Exhibit 12-A and 12-B for identification and asks that they be duly admitted and marked.

The Court: They may be admitted and marked.

(Lucky coins were marked Plaintiff's Exhibit 12-A and 12-B.)

Mr. Sullivan: Resuming the reading of the deposition:

“Q. Were these lucky coins distributed to the patrons and [41] customers of the Stork Club?

“A. Yes, they were.

“Q. What is your next item?

“A. Book Matches.

“Q. I show you an article and ask you if this is a sample of the 6,983,750 book matches purchased by the Stork Restaurant during the period mentioned, at a cost of \$18,095.42?

“A. It is.

“Mr. Goldwater: Mark that for identification.

“(Sample of book matches thereupon marked Plaintiff's Exhibit 13 for identification, 10/2/46.)”

Mr. Sullivan: At this time I will show Mr.

(Deposition of John J. Farrell.)

Picard Plaintiff's Exhibit 13 for identification which I have produced here in court (showing).

The Plaintiff offers Plaintiff's Exhibit No. 13 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Sample of book matches marked Plaintiff's Exhibit 13.)

Mr. Sullivan: Resuming the reading of the deposition:

"Q. During the period mentioned were all of these six million odd book matches distributed to patrons of the Stork Club? A. They were.

"Q. Were they all distributed at the club or were some of [42] them distributed in any other manner?

"A. Some were distributed by mail.

"Q. That is, to certain selected names on your mailing list?

"A. Yes, and there were also some distributed by the TWA, the airport company, and they were distributed from their different airports all over the country.

"Q. Was that by special arrangement that they were furnished to the air lines with the understanding that they would be distributed from the airports? A. That is correct.

"Q. What is your next item?

"A. Jewelry.

"Q. Will you describe some of the items of jew-

(Deposition of John J. Farrell.)

ely included in your statement that there were 26,608 separate items of jewelry purchased by the Stork Club at a cost of \$9,969.36?

“A. Stork Club pins, Stork pins.

“Q. I show you two samples, one of gold and one of silver, of an article appearing to be a pin, and ask you whether these are samples of the Stork Club pins included in the total of 26,608 items?

“A. They are.

“Q. Do you know how many of each of these were distributed?

“A. I know that over 14,000 of these particular pins were distributed. [43]

“Q. Both of gold and silver?

“A. That is correct.

“Mr. Goldwater: I ask these be marked for identification.

“(Two articles, being one gold and one silver pin, thereupon marked—gold pin—as Plaintiff’s Exhibit 14-A for identification; silver pin marked Plaintiff’s Exhibit 14-B for identification, 10/2/46.)”

I now show Mr. Picard Plaintiff’s Exhibit No. 14-A for identification and Plaintiff’s Exhibit No. 14-B for identification which are produced here in court (showing).

Plaintiff at this time offers in evidence Plaintiff’s Exhibit No. 14-A for identification and 14-B for identification and asks that they be duly admitted and marked.

(Deposition of John J. Farrell.)

The Court: They may be admitted and marked.

(The gold pin is marked Plaintiff's Exhibit No. 14-A, and the silver pin is marked Plaintiff's Exhibit No. 14-B.)

Mr. Sullivan: Resuming the reading of the deposition:

"Q. Can you recall now some of the other items of jewelry included in the total of 26,608 items?

"A. Yes, there were Stork earrings.

"Q. You mean, earrings, in the shape of a stork, for wear by women? A. Yes.

"Q. When I say 'in the shape of a stork,' I mean to ask whether the shape was in the form of the insignia which appears [44] on numerous of these items already marked for identification.

"A. Yes.

"Q. In the same insignia form?

"A. In the same insignia form. There were also cuff-links.

"Q. Did they bear the insignia of the Stork Club? A. No.

"Q. The cuff-links did not?

"A. The insignia—yes.

"Q. They were not in the form of the insignia, but they did bear the insignia?

"A. They were the insignia, the same as the pins.

"Q. How did it appear,—was it by engraving on the links?

"A. It was cut out the same as the pins.

(Deposition of John J. Farrell.)

“Q. The link was shaped in the form of the insignia? A. That is correct.

“Q. Can you think of any other items of jewelry included in that total?

“A. They were all pins or brooches that I think of now, cuff-links and earrings.

“Q. May I ask whether you have the bills in the file, which were produced, for the total of 26,608 items? A. I have.

“Q. Do you know that those bills were all paid by the Stork Club? A. They were. [45]

“Q. I ask you, with respect to all of these items, in the event I have omitted asking the question, in respect to any single one, whether the bills for all of the items that you have described, as purchased by the Stork Club and distributed to its customers and its patrons, are present here at this hearing? A. They are.

“Mr. Goldwater: I offer them for examination if counsel wishes to identify any of them or examine in respect to any of them.

“Q. I don't know whether I asked you if all of these 26,608 items of jewelry, with the exception of a few samples which you produced here, were distributed among the patrons of the Stork Club?

“A. They were.

“Q. Mr. Farrell, I show you a cardboard or paper article bearing the insignia of, and the name, 'Stork Club,' and ask you whether that was also used for publicity and advertising purposes.

“A. It was.

(Deposition of John J. Farrell.)

“Q. Can you tell us how many of these were purchased? A. No, I can't.

“Q. Was it in the hundreds of thousands?

“A. They were well into the thousands.

“Q. Have you been able to find the bill for this item? [46]

“A. I did have some bills. They are probably among the ones I have here, now, from the Lion Match Company. I took off the matches, and I didn't take off the other advertising matter.

“Q. Such as those cartons which are called 'wrapad'; but you are able to say it was in the many thousands? A. Yes, I would say so.

“Q. Were those also distributed to customers of the Stork Restaurant? A. They were.

“Mr. Goldwater: I ask that be marked for identification.

“(Paper article, referred to, thereupon marked Plaintiff's Exhibit 15 for identification, 10/2/46.)”

At this time I will show Mr. Picard Plaintiff's Exhibit 15 for identification which I produced here in court (showing).

The Plaintiff offers at this time Plaintiff's Exhibit 15 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Paper article is marked Plaintiff's Exhibit No. 15.)

(Deposition of John J. Farrell.)

Mr. Sullivan: Resuming the reading of the deposition, if your Honor please:

“Q. Mr. Farrell, I show you a leather article and ask you what it is. A. It is a dice cup. [47]

“Q. This bears the name ‘Stork Club NYC’ with the insignia that you have already described. I ask you whether you know if any number of these were purchased by the Stork Club and distributed among the patrons for purposes of advertising and publicity.

“A. Yes, they were, and they were distributed.

“Q. Can you tell us how many?

“A. Not offhand.

“Q. Do you know whether there were 100 or more?

“A. Yes, I would say there were over 1000 of them purchased.

“Q. Have you been able, up to this point, to segregate the bills for these particular items?

“A. I believe I can find them.

“Q. Do you know from whom they were purchased?

“A. They were purchased from the Elklold Company.

“Q. You think the bill for these items is among the duplicate bills?

“A. No, that is not among them.

“Mr. Goldwater: I ask that be marked for identification.

“(Dice cup, referred to, thereupon marked

(Deposition of John J. Farrell.)

Plaintiff's Exhibit 16 for identification, 10/2/46.)”

I will show Mr. Picard Plaintiff's Exhibit No. 16 for identification which I produced here in court (showing).

Plaintiff offers in evidence Plaintiff's Exhibit No. 16 [48] for identification and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Dice cup is marked Plaintiff's Exhibit No. 16.)

Mr. Sullivan: Resuming the reading of the deposition:

“Q. I show you an enameled receptacle, and ask you what that is. A. An ashtray.

“Q. Is that an ashtray which was used by the Stork Club and/or distributed by it to its patrons?

“A. Yes, it was used by the Stork Club and some of them were distributed among our patrons.

“Q. Where did they appear in the Stork Club?

“A. On the tables in the dining-room.

“Q. They are still so used? A. Yes.

“Q. Can you say for how many years they have been so used?

“A. About five or six years, I would say.

“Q. Do you know how many of these were purchased? A. Not offhand, no.

“Q. Can you say how many were distributed among the patrons?

“A. I would say there were several thousand.

(Deposition of John J. Farrell.)

“Q. Have you been able to locate the bill for these items? A. No, I have not.

“Q. Do you know from whom they were purchased?

“A. I know some of them were purchased from Nathan Straus-Duparquet. [49]

“Mr. Goldwater: I ask that be marked for identification.

“(Ashtry, referred to, thereupon marked Plaintiff’s Exhibit 17 for identification, 10/2/46.)”

If your Honor please, I will at this time show Mr. Picard Plaintiff’s Exhibit No. 17 for identification which I have produced here in court (showing).

Plaintiff offers Plaintiff’s Exhibit No. 17 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Ashtray is marked Plaintiff’s Exhibit No. 17.)

Mr. Sullivan: Resuming the reading of the deposition:

“Q. I show you a sticker with paste attachment on the back and ask you whether this represents an item used in the advertising and publicity of the plaintiff, Stork Restaurant, Inc.? A. It is.

“Q. How was this used; in what fashion?

“A. It was pasted on packages and bags, and

(Deposition of John J. Farrell.)

we had smaller ones than those for pasting into the hats of our customers.

“Q. You say some were pasted on packages and bags. You mean, packages and bags of patrons checked at the Stork Club?

“A. Yes, which were checked at the Stork Club.

“Q. Have you any idea how many of these were purchased and used by the Stork Restaurant in that fashion?

“A. It was way up into the thousands. [50]

“Q. Were they also used on packages mailed out by the Stork Club?

“A. All packages mailed out had those stickers.

“Mr. Goldwater: I ask that be marked.

“(Sticker referred to thereupon marked Plaintiff’s Exhibit 18 for identification, 10/2/46.)”

I have here Plaintiff’s Exhibit 18 for identification which is the sticker referred to and I have shown it to Mr. Picard.

At this time Plaintiff offers Plaintiff’s Exhibit 18 in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The sticker is marked Plaintiff’s Exhibit No. 18.)

Mr. Sullivan: Resuming the reading of the deposition:

(Deposition of John J. Farrell.)

“Q. I show you a small sticker of the same character as the last exhibit. Is this the sticker that you described as one of the small ones, similar to the one last marked for identification?”

“A. Yes, and it is also used on the back of some of our mail.

“Q. Can you say how many of these were purchased and used by the Stork Club, which you described?”

“A. They were way up in the thousands.

“Q. Are they also used in the hat bands of customers by pasting them in while the customer is enjoying the facilities of the Stork Club? [51]

“A. Yes.

“Mr. Goldwater: I ask that be marked for identification.

“(Smaller sticker, referred to, thereupon marked Plaintiff’s Exhibit 19 for identification, 10/2/46.)”

At this time, if your Honor please, I will show Mr. Picard Plaintiff’s Exhibit 19 which I have produced here in court (showing).

Plaintiff will offer Plaintiff’s Exhibit 19 for identification in evidence and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The smaller sticker is marked Plaintiff’s Exhibit 19.)

Mr. Sullivan: Resuming the reading of the deposition:

(Deposition of John J. Farrell.)

“Q. I show you a picture with the representation of the insignia of the Stork Club on it and ask you if that is an item used in the publicity and advertising program of the Stork Club during the years that you have described? A. It is.

“Q. And were these used in the Stork Club?

“A. They were used in the Stork Club, and some of them have been distributed among our patrons.

“Q. Can you tell us how many were distributed among your patrons? A. No, I cannot.

“Q. Do you know from whom they were purchased?

“A. I believe they were purchased from Nathan Straus-Duparquet. [52]

“Q. Can you tell us, now, how many were purchased or how many were distributed?

“A. No, I cannot.

“Q. Do you know the approximate years they were so distributed?

“A. They have been distributed since about 1944.

“Mr. Goldwater: I ask that be marked.

“(Pitcher, referred to, thereupon marked Plaintiff's Exhibit 20 for identification, 10/2/46.)”

At this time, if your Honor please, I will show Mr. Picard the pitcher referred to which has been previously marked Plaintiff's Exhibit No. 20 for identification (showing).

At this time, if your Honor please, the Plaintiff

(Deposition of John J. Farrell.)

offers Plaintiff's Exhibit 20 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The pitcher was marked Plaintiff's Exhibit 20.)

Mr. Sullivan: Resuming the reading of the deposition:

"Q. I show you a paper napkin bearing the name and insignia of the Stork Club, 3 East 53rd Street, and ask you if that is an item that was used in the publicity and advertising program.

"A. It is.

"Q. Can you tell us from whom those were purchased?

"A. From Harlem Paper Products. [53]

"Q. Have you located the bill for the number that were purchased?

"A. I believe I can locate them.

"Q. Do you know how many were purchased?

"A. No.

"Q. Where were they used?

"They have been used at the bar of the Stork Club.

"Q. For how long, approximately?

"A. For about eight years.

"Q. Can you state whether the number ran into the hundreds or thousands?

"Hundreds of thousands.

(Deposition of John J. Farrell.)

“Mr. Goldwater: I ask that be marked for identification.

“(Paper napkin, referred to, marked Plaintiff’s Exhibit 21 for identification, 10/2/46.)”

At this time I will show Mr. Picard Plaintiff’s Exhibit 21 for identification which I have produced in court (showing).

At this time Plaintiff offers in evidence Plaintiff’s Exhibit 21 for identification and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Paper napkin is marked Plaintiff’s Exhibit 21.)

Mr. Sullivan: Then, if your Honor please, may the record show that I have finished reading Page 49 of the deposition where the following appears:

“(Colloquy off the record with referenced to adjourned date of examination.)

“(On consent, the examination was adjourned to a date to be agreed upon by counsel.)”

I will read from Page 51 of the deposition.

“(Met pursuant to agreement.)”

“Mr. Goldwater: Mr. Farrell is recalled.

“John J. Farrell resumed the stand, having previously been duly sworn, testified as follows:

“Direct Examination (Continuing.)

“By Mr. Goldwater:

“Q. Mr. Farrell, on the previous examination you testified that the books which the Stork Club

(Deposition of John J. Farrell.)

maintained consisted of a general ledger, purchase journal, petty cash book, cash receipts book or disbursements book, and earnings book; is that correct?

“A. That is correct.

“Q. It appears that, in answer to a question whether correct records and entries of all the transactions of the Stork Club were kept in books for advertising expenses of all kinds, during the period you described, that you said they were so correctly kept; is that right? A. That is right.

“Q. Were the figures concerning advertising expense of all categories, to which you testified in your previous examination, obtained from the books in which these records were kept by the [55] Stork Restaurant, Inc.? A. Yes.

“Q. I would like you now to testify as to how these figures found their place in the ledger which, I understand, is the final place of entry. What would be the first book of entry in which these items would find their place?

“A. The first book of entry in most cases would be the purchasing journal. That would be entered from the bill.

“Q. From the purchase journal where would they then be transferred?

“A. The total of the advertising column in the purchase journal would be posted to the general ledger, the advertising account in the general ledger.

“Q. That general ledger is the book from which you say you took these final totals?

“A. That is correct.

(Deposition of John J. Farrell.)

“Q. So far as any of these figures involved cash payments, where would the first entry find itself?

“A. Cash payment, the first entry would find itself in the cash disbursements book.

“Q. And from there transferred where?

“A. To the general ledger. In some cases there are some bills that were not entered in the purchase journal that were paid immediately, and they would be entered also in the cash disbursements book. [56]

“Q. From there was it transferred to the general ledger? A. Yes, to the general ledger.

“Q. Are the general ledgers for all of these periods as well as the purchase books and the cash books here? A. Yes.

“Q. Are there present at this hearing all of the books and records from which the original entries, of each purchase or each disbursement for advertising and publicity purposes were made, and can be found? A. Yes.

“Q. You referred in your last examination, at Page 16, to work sheets upon which you entered the totals which you computed on each of the items of expenditure for the purpose which you enumerated from the years 1937 to 1945. Were the work sheets, that you there referred to, these yellow sheets which were subsequently marked Plaintiff's Exhibit 1 for identification? A. Yes.

“Q. These are the work sheets (indicating)?

“A. Those are the work sheets.

“Q. From which books did you obtain the figures which you entered on this exhibit?

(Deposition of John J. Farrell.)

“A. Those figures entered on the exhibit were taken from the actual bills.

“Q. Are all the actual bills from which you took those figures here present? [57] A. They are.

“Q. Are they contained in these folders which were marked as Exhibit 2? A. Yes.

“Mr. Goldwater: Mr. Frank, I would like your consent to have the reporter mark at some convenient time each of these folders for identification, with a sub-letter under the same exhibit number, as Exhibit 2-A, 2-B, and so forth, indicating the number of bills in each folder. I will not take the time to do that right now.

“Mr. Frank: That is agreeable.

“Mr. Goldwater: There are 88 folders in all, each containing separate bills.

“(Same marked Plaintiff’s Exhibit 2-A to and including 2-HHHH.)

“Q. Mr. Farrell, can you tell us the number of persons employed by Stork Restaurant, Inc. in its establishment in New York, and the operation of the Stork Club, and the capacity in which they are employed as of any recent period?

“A. Yes, as of September 13, 1946, there were 244 on the payroll.

“Q. Will you break those down into employees of various classes?

“A. There were 27 musicians, 41 kitchen help, 94 restaurant help, which consists of headwaiters, captains, waiters and [58] busboys; 12 bar em-

(Deposition of John J. Farrell.)

ployees and 70 general employees consisting of general help around the club.

“Q. That would be these employees?

“A. Yes, these employees, and coatroom attendants, stewards in the storeroom, porters, doormen, cashiers, checkers, receptionists, telephone operators, photographers, publicity men, managers and assistant managers.

“Q. From what book have you compiled those records? A. From the payroll record.

“Q. Is the payroll record here present?

“A. Yes.

“Q. Mr. Farrell, will you tell us now what the gross amount of business of the Stork Restaurant, Inc. in its establishment known as the Stork Club in New York, was during each of the years 1935 through the year 1945?

“A. In 1935, the gross was \$497,356.94; 1936, \$698,411.92; 1937, \$703,710.68; 1938, \$625,112.18; 1939, \$632,596.13; 1940, \$615,918.54; 1941, \$698,844.73; 1942, \$877,899.47; 1943, \$1,202,423.90; 1944, \$1,443,515.52; 1945, \$1,660,074.85.

“Q. What is the total for that period of eleven years? A. \$9,655,864.96.

“Q. Can you tell us the approximate number of persons who patronize the Stork Club during the course of an average day in 1945, and will you tell us how you reached the conclusion of the figure you are testifying to? [59]

“A. The average number of people in the club are approximately 1500 a day. I took those figures

(Deposition of John J. Farrell.)

from the original work sheets from which the checks are distributed for the first ten days of June, 1945, and the first ten days of November, 1945.

“Q. You have picked two periods of the year?

“A. One was rather slow, and the other one where business was at the top.

“Q. You considered, then, that the average would be a fair average for the year?

“A. That is correct.

“Q. Will you tell us how you calculated the total number?

“A. From the number of guests appearing on the checks.

“Q. Do the checks for each customer indicate the number of persons for whom the order is given?

“A. That is correct.

“Q. What books and records of the Stork Restaurant contain the entries with respect to the total amount of business, dollar business, in each of the years in which you testified?

“A. The general ledgers.

“Q. How does that figure reach the general ledger?

“A. Through the earnings book, which is a book that is kept of the daily receipts.

“Q. You entered daily the daily receipts calculated from the individual customer's checks?

“A. Yes. [60]

“Q. And then the total for the day is transferred where?

“A. The total for the day is entered into an

(Deposition of John J. Farrell.)

earnings book, and the total of the earnings book at the end of the month is transferred to the general ledger.

“Q. The general ledger and earnings book are both present? A. Yes.

“Q. Is there a book or record present which will contain the number of checks on each of the days in the period for which you calculated the average number of customers?

“A. Yes, those records are here.

“Q. What records would those be?

“A. They are the earnings sheets.

“Q. You have those here present?

“A. Yes.

“Q. Can you tell us the approximate number of lunches, dinners and suppers served in the Stork Club on an average day in the year 1945?

“A. Taking the same period, 240 lunches, 460 dinners and suppers.

“Q. Dinners and suppers are the aggregate of 460? A. Yes.

“Q. Is that determined from the number of checks as well? A. Yes.

“Q. Is there a record available from which you can determine whether or not the Stork Club receives mention in the [61] public press, magazines and books, and what is that record?

“A. Yes, we have a record—a clipping service. We have a clipping service that gives us that record.

“Q. Can you tell us for any recent six-month period how many times the Stork Club operated by

(Deposition of John J. Farrell.)

the Stork Restaurant, Inc., in New York, has been mentioned in the public press, magazines, and including photos of people taken at the Stork Club?

“A. My recent check shows there were over a thousand mentions of the Stork Club in the public press. They contain only photos.

“Q. Those are mentions accompanied by photos taken in the Stork Club exclusively?

“A. Yes, exclusively.

“Q. That would not include all the mentions of the Stork Club? A. Oh, no.

“Q. Will you tell us what period that includes?

“A. That includes from December 1945 to July 9, 1946.

“Q. How do you know there were a thousand, approximately, in that period?

“A. I checked the clippings when they came in from the press clipping service.

“Q. What specific interest have you in making such a check?

“A. Well, I am specifically interested in seeing how many [62] times we are mentioned in each of these.

“Q. Are you also billed for those clippings?

“A. Oh, yes. That is the main idea, to find out how many clippings we are being billed for.

“Q. Did you pay the bills for that number of clippings after checking the actual clippings from newspapers? A. Yes, those bills were paid.

“Q. What area are those newspapers published in from which such clippings are taken?

(Deposition of John J. Farrell.)

“A. All over the United States.

“Q. Would that include practically every state in the union?

“A. Practically every state in the union, yes.

“Q. Was there a period in recent years during which you had subscribed to the clipping service for clippings which had mere mention of the Stork Club in some of the columns of the paper, without photographs?

“A. Yes, there was a period.

“Q. What period was that?

“A. The period in 1942. It was from March 4th to May 4th. We had over a thousand clippings in that period.

“Q. Those were 1000 clippings of mention in the local press for which you actually paid?

“A. Yes, that is right.

“Q. How long has the Stork Restaurant, Inc., operated the [63] Stork Club at 3 East 53rd Street, Mr. Farrell? A. Since August, 1934.

“Q. Has the operation been continuous from that period down to date? A. Yes.

“Q. Are you an officer of the Stork Restaurant, Inc.? A. Yes.

“Q. What office do you hold?

“A. I am president.

“Q. Do you know who the principal stockholder of the Stork Restaurant, Inc., is?

“A. Hazel Billingsley.

“Q. Is she the wife of Sherman Billingsley, the managing director of the club? A. Yes.

(Deposition of John J. Farrell.)

“Q. Has she been the principal stockholder since its incorporation? A. Yes.

“Q. Has Mr. Sherman Billingsley been the managing director of the club since August 1934?

“A. Yes, he has.

“Q. Do you know whether there was a Stork Club operated in New York prior to August 15, 1934? A. Yes.

“Q. Where was that operated, and for approximately what [64] period?

“A. At 53 East 51st Street for the period of 1929 to 1934.

“Q. By what corporation, if you know, was that club operated?

“A. The 53 East 51st Street Corporation.

“Q. Was it also for a time operated by a corporation known as Stork Restaurant Corporation?

“A. Yes.

“Q. Do you know who was the principal stockholder of both those corporations?

“A. Hazel Billingsley.

“Q. Who was the managing director of both those corporations? A. Sherman Billingsley.

“Q. Can you tell us what happened to those corporations and to the business when those corporations ceased business?

“A. The 53 East 51st Street Corporation was a successor in interest to the Stork Restaurant Corporation, and when they went out of business, all the assets, good will were purchased by Hazel Billingsley who, in turn, turned them over to the

(Deposition of John J. Farrell.)

Stork Restaurant, Inc., for the majority of issued stock in the Stork Restaurant, Inc.

“Q. As a matter of fact, was it not transferred for all of the issued stock?

“A. Yes, for all of the issued stock. [65]

“Q. That is, all of the issued capital stock?

“A. All of the issued capital stock, yes.

“Q. Was the name of the Stork Club transferred along with all those assets?

“A. Yes. That was included in the assets.

“Mr. Goldwater: I offer this stipulation, with the consent of Mr. Frank:

“It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the foregoing testimony of John J. Farrell, with respect to the entries made by him personally, or under his supervision from books and records of the Stork Restaurant, Inc., which testimony is based on extracts made by him from such books and records, all of which were present at the taking of the deposition, shall have the same force and effect as though the said books and records were offered in evidence on the taking of the deposition, and during his testimony.

“It Is Further Stipulated and Agreed that all of said books and records are now, and will continue to be, available to counsel for the defendants for examination and inspection and reference thereto in connection with the examination of any witness whose deposition is taken herein, during the taking of such Depositions, or at any other time, at the convenience of counsel for the defendants; and

(Deposition of John J. Farrell.)

“It Is Further Stipulated and Agreed that any and all [66] objections, which might have been or could be made, based on the fact that such original books and records of Stork Restaurant, Inc., are not offered in evidence on the deposition, are hereby waived.”

Now, if Your Honor please, in connection with that stipulation, at the time that we were discussing the stipulation, that is, when I was discussing it with Mr. Goldwater in New York, I mentioned to Mr. Picard the fact that we did not want to bring the original books here to San Francisco, and Mr. Picard said that he would not require it, and I told him if he did we would make arrangements to do so. I will ask you now, Mr. Picard, if you will in accordance with this stipulation, stipulate that these records may be regarded as testimony without the necessity of these original books.

Mr. Picard: I will adopt Mr. Frank's stipulation.

Mr. Sullivan: Do you want to read the cross-examination?

Mr. Picard: Yes.

“Cross-Examination

“By Mr. Frank:

“Q. Do I understand, Mr. Ferrell, that there was a Stork Club operated under that name during the so-called prohibition period, that is, from 1929 up to the end of 1933? A. Yes.

“Q. And that the ownership and the direction of

(Deposition of John J. Farrell.)

that club was substantially similar to what has been carried on since [67] that date?

“A. That is right.

“Q. Was there any particular reason why there was this shift in owing or operating corporations at that time?

“A. No, except—there was no particular reason that I know of.

“Q. Were there any seizures of the property by the prohibition authorities during the period before the present corporation was formed?

“A. None that I know of.

“Q. Were there any arrests at the place, or claims in any form whatever by any of the authorities, that the Prohibition Law was violated in the operation of the place?”

Mr. Sullivan: May the record show that Mr. Goldwater makes the following objection: “I object to that on the ground that it is not material or relevant.” At this time, if Your Honor please, as counsel for the plaintiff, I will object to the question on the same grounds.

The Court: It may or may not become material. I will allow it subject to a motion to strike.

Mr. Picard: (Reading.)

“A. Not to my knowledge.

“Q. Were you in active employment during that period between 1929 and 1934? A. No. [68]

“Q. Those circumstances might have existed without your knowledge?

(Deposition of John J. Farrell.)

“A. Yes, they might have, but not that I know of.

“Q. Since 1934 you have been actively engaged in the business as accountant for the corporation?

“A. Yes.

“Q. Of course, your connection with it has been simply from the standpoint of bookkeeping and keeping of records. You have had no actual direction of the business? A. No.

“Mr. Frank: That is all.

“Sworn to before me this 4 day of Dec. 1946. John J. Farrell. Louis G. Schwartz, Notary Public.”

Mr. Sullivan: At this time, if Your Honor please, I would like to read the testimony of the witness John J. Farrell when he resumed the stand, beginning on Page 110:

“Mr. Goldwater: I would like to ask Mr. Farrell a few more questions.

“John J. Farrell resumed the stand, testified further as follows:

“Redirect Examination

“By Mr. Goldwater:

“Q. Mr. Farrell, you testified in your examination, at our first hearing, that the total sum which was spent for advertising publicity purposes by the Stork Restaurant, Inc. for 1935 [69] through the year 1945 was approximately \$727,000?

“A. That is correct.

“Q. Subsequently you testified to specific items purchased for distribution by the Stork Club bear-

(Deposition of John J. Farrell.)

ing the insignia of the Stork Club between the years 1937 and 1945 which aggregated approximately \$206,000? A. Yes.

“Q. Can you tell us what additional expenditures there were by cash for items which were distributed in the same manner for advertising and publicity at the Stork Club during 1935 and 1936?

“A. \$80,618.

“Q. Can you tell us what additional expenditures there were during the years 1935 and 1936 under the heading of ‘House Charges’?

“A. For 1935 and 1936, \$110,509.

“Q. For the entire ten-year period from 1935 to 1945, how much would that item amount to?

“A. \$175,726.

“Q. What item would come under this heading of ‘House Charges’?

“A. Under ‘House Charges’ that would be items of food and liquor checks which were complimented to our guests.

“Q. What kind of guests particularly?

“A. Particularly they would be members of the newspaper [70] field and radio celebrities and stars of stage and screen, men in prominent and public life in the industrial world.

“Q. Was it the policy of the Stork Club to so compliment these people in its general program of establishing good will for the Stork Club in New York?

“A. Establishing good will and advertising, yes.

“Q. You have accounted, Mr. Farrell, for a total

(Deposition of John J. Farrell.)

of approximately \$461,000 of the total of \$727,000, which, you say, was expended in the aggregate in your publicity and advertising program. What would the difference be composed of?

“A. The difference would be composed of cash gifts, liquor purchases used for advertising, salary, supplies——

“Q. Salaries for advertising?

“A. Salaries for advertising, supplies for the Advertising Department.

“Q. Such as what?

“A. Photo supplies, cameras, developing fluid, prints, folders, and such things as that, and some fees to advertising agencies in the early years.

“Q. Are the books and records, both original entry and of final entry, indicating totals from which those figures were obtained, and in which the original items you mentioned are entered, all present here in this office?

“A. Yes, they are present.

“Mr. Goldwater: That is all. [71]

“Mr. Frank: No further questions.”

The Court: We will now take a recess.

(Recess.)

Mr. Sullivan: If Your Honor please, at this time plaintiff offers in evidence the testimony of the witness Donald Arden, by reading into the evidence the deposition of Donald Arden which was taken pursuant to notice and at the same law offices that I mentioned to Your Honor in connection with the

deposition of the witness John J. Farrell, with the same appearance on behalf of the parties, taken on November 1, 1946. And I at this time read that deposition in evidence:

Deposition of Donald Arden

“The Notary: Please state your name and address.

“The Witness: Donald Arden, 74 East Central Avenue, Maywood, New Jersey.

“Direct Examination

“By Mr. Goldwater:

“Q. Mr. Arden, are you associated with Stork Restaurant, Inc., the operator of the Stork Club at 3 East 53rd Street, New York.

“A. Yes, I am.

“Q. In what capacity?

“A. As publicity director and photographer.

“Q. How long have you been associated with the Stork Restaurant?

“A. Since 1939 until enlistment in the Navy in 1942, for [72] three years and eight months when I was out in service and back since October 15, 1945.

“Q. You were there three years and eight months and then out during the period of the war?

“A. I was out for three years and eight months in that period.

“Q. Your employment began, then, when?

“A. In 1939.

“Q. It has continued to date except for the period when you were in the Navy?

“A. That is correct.

(Deposition of Donald Arden.)

“Q. That is, during the late war?

“A. That is right.

“Q. You are now associated with the club as publicity representative?

“A. Yes, and photographer.

“Q. You know that the business of the Stork Restaurant, Inc. is the operation of the restaurant and night club known as Stork Club at 3 East 53rd Street? A. Yes, I do.

“Q. Has that name been used all of the time that you have been employed at the Stork Restaurant, Inc.? A. It has.

“Q. When you were first employed by Stork Restaurant, Inc., did the Stork Club use any insignia which was identified with [73] its operation? A. Yes, it did.

“Q. What was the insignia?

“A. It was a stork with one leg perched up with a monocle and with a top hat.

“Q. Is it the same insignia which appears on the numerous exhibits which have been offered here during the deposition of Mr. Farrell, and which have been marked for identification in this proceeding?

“A. Yes.

“Q. Have you been here during all of the periods of the taking of Mr. Farrell's testimony?

“A. I have.

“Q. Can you identify each one of those exhibits which were offered, and which were identified by Mr. Farrell as an item which was used in the adver-

(Deposition of Donald Arden.)

tising and publicity of Stork Restaurant, Inc. for the Stork Club in New York?

“A. Yes, I can.

“Q. How long do you know of the existence of the Stork Restaurant and the use of this insignia, that you have described, by it in its publicity and advertising, prior to your association with the Stork Restaurant?

“A. Prior to my association with the Stork Club, in the vicinity of five years.

“Q. Do you know of your own knowledge that the gifts and [74] all of these items, which were marked for identification, were actually distributed in substantially the volume which Mr. Farrell has described in the general program of publicity and advertising the Stork Restaurant, Inc.?

“A. Yes, I do.

“Q. Did you participate in the distribution of a large volume of any one or more of these items,—yourself?

“A. I have in the majority of cases. I have been a witness in other cases being distributed by various members for the Stork Club.

“Q. You mean members of the staffs of the Stork Club? A. Yes.

“Q. Will you give us an example of one or two of the items in which you participated in the distribution?

“A. I have seen these Stork Club ashtrays. I have seen those given out to numerous customers who requested them, and we also gave as souvenirs,

(Deposition of Donald Arden.)

to bring home, and show other patrons, of their visit to New York City at the Stork Club, and car emblems.

“Q. You refer to Exhibit No. 3 for identification?

“A. Yes. I have participated in giving these, and the car tags to each and every one of them.

“Q. You refer to the automobile tag?

“A. Yes. I participated in clamping them on different cars, of different visitors who owned automobiles. [75]

Then, radios—that is Exhibit No. 5 for identification—I have seen and participated in giving numerous radios to different debutantes of the society world in New York City.

“Q. What about the match pads?

“A. Match pads, I have given these out to hundreds—these match pads, Exhibit 13, are placed upon tables during the luncheon, dinner, cocktails and supper, and I would say that at least 1500 of these are taken out of the club, or given to different customers during each day of the week.

“Q. Have you also, yourself, participated in the preparation of many hundreds of thousands of those for mailing to customers?

“A. Yes. In fact, we subscribe to a service called Celebrated Service, and receive in the mail each and every day a list of arrivals and departures of various people in the public limelight, such as movie, stage, political, industrial, and anyone that is in the public limelight, we send these out and

(Deposition of Donald Arden.)

they are delivered by hand, and also mailed in special cartons, which the Post Office has passed upon, and we send a box or a carton—a box which contains 50 match boxes.

“Q. Have you sent many thousands of those, yourself?

“A. I would say, thousands and thousands of them.

“Q. Will you tell us whether you are familiar with the mailing lists used by the Stork Club for publicity and advertising purposes? [76]

“A. Yes, I am, very much so.

“Q. Will you tell us how that mailing list is prepared, and of what it is comprised?

“A. I would say, to begin with, our mailing list is in the vicinity of around 200,000 which consists of the registers of various schools, clubs, private mailing list of the movie people on the west coast, Congressmen, Senators, and Mayors; also, of social register of New York City and all over the United States.

“Q. Is there included in that list all sorts of this comprehensive mailing list, social registers of any of the cities in California?

“A. Yes. We have for display here a register from 1941 and 1935—

“Q. Is that for San Francisco?

“A. For San Francisco, itself. And we have used this book of the San Francisco register for our mailing purposes as prospective customers.

“Q. Do you know whether many articles for

(Deposition of Donald Arden.)

publicity and advertising purposes, distributed by the Stork Club, were sent through the United States mail to persons whose names appear in the social register you have described?

“A. Yes. I can say, many thousands of them; also in the vicinity of San Francisco, I have here for disposal tear sheets, duplicates of copies which were sent to various customers who visited the Stork Club in San Francisco and within forty-mile [77] district area of San Francisco. I have clippings and pictures. Here are a very few of them (witness indicating).

“Q. What is this called?

“A. Duplicates of caption sheets attached to the photograph itself, and mailed to the San Francisco papers.

“Q. You handed me 25 sheets bearing the heading, ‘Publicity Department, Stork Club, 3 East 53rd Street, New York.’ Are these what you have described as ‘captions’?

“A. That is correct, as captions. That is not the entire amount. Those are just a few taken out of the files recently.

“Q. To what was each of these captions attached?

“A. They were attached to the photographs of the persons that patronized the Stork Club, from San Francisco, or in the vicinity of San Francisco.

“Q. And the names of the persons whose photographs were taken at the Stork Club, I assume?

“A. Yes, those pictures were taken at the Stork

(Deposition of Donald Arden.)

Club, and also the names and addresses of the person whose picture was taken, and the caption was given by the persons themselves.

“Q. In each instance, was this caption attached to a photograph sent for re-publication in a newspaper? A. Yes, it was.

“Q. And does the name of the newspaper to which it was sent appear in handwriting on each of these captions?

“A. Yes, it does, plus the date that it was sent by mail. [78]

“Q. Are many of these handwritten entries on these captions your own personal entries?

“A. Not all of them. We have a girl that does most of the typing of the captions, plus mailing.

“Q. Is that done under your direction and supervision? A. That is right.

“Q. That is in your department, the department of which you are the head?

“A. That is right.

“Q. From your experience at the Stork Club, can you testify that these entries were made, and the dates were marked on each of these captions, on the date on which the captions were sent out accompanying the photograph to the newspaper whose name appears?

“A. And mailed the same day, yes.

“Q. That is in the regular course of business?

“A. That is our regular daily chore.

“Mr. Goldwater: I ask that this group of 25

(Deposition of Donald Arden.)

caption sheets be marked as a single exhibit for identification.

“(Group of 25 caption sheets thereupon marked Plaintiff’s Exhibit 22 for identification, 11/1/46.)”

Addressing myself to your Honor, I have produced here, if your Honor please, Plaintiff’s Exhibit 22 for identification which bears the signature of the reporter and is dated November 1, 1946, and I will submit them to Mr. Picard (showing). [79]

Plaintiff at this time offers in evidence Plaintiff’s Exhibit 22 for identification consisting of 25 caption sheets, and asks that they be admitted and marked.

The Court: They may be admitted and marked.

(Group of 25 caption sheets marked Plaintiff’s Exhibit 22.)

Mr. Sullivan: Resuming the reading of the deposition, if your Honor please:

“Q. You have handed me three photographs, 8 inches by ten inches, and each has a negative attached. Will you tell me where these photographs were taken?”

“A. Yes, those photographs were taken at the Stork Club, and the names were given by the people whose photographs were taken.

“Q. The people who are represented in the photographs? A. Yes, that is right.

“Q. Have you other photographs of residents of San Francisco or its vicinity, which were also taken at the Stork Restaurant?”

(Deposition of Donald Arden.)

“A. I imagine they can be checked without files and more can be produced.

“Q. You know that the photographs which accompany the caption sheets, which have just been introduced as Plaintiff’s Exhibit 22 for identification, each had attached to them a photograph similar to these three which you now hand me?”

“A. That is correct. [80]

“Mr. Goldwater: I offer these three photographs for identification.

“(Three photographs thereupon marked Plaintiff’s Exhibit 23 for identification, 11/1/46.)”

Not reading from the deposition, and addressing myself to your Honor, I have produced here Plaintiff’s Exhibit 23 for identification, which bears the signature of the reporter and the date November 1, 1946, and I show them to Mr. Picard.

I have here Plaintiff’s Exhibit 23 for identification consisting of three photographs, negatives, and I wish to offer them in evidence and ask that they be admitted in evidence as Plaintiff’s Exhibit 23.

The Court: They may be admitted and marked.

(The three photographs are marked Plaintiff’s Exhibit 23.)

Mr. Sullivan: Resuming the reading of the deposition:

“Q. Mr. Arden, do you know whether or not the Stork Restaurant subscribed from time to time to press clipping services known as Romeike Press Clippings, and also to the Burrelle’s Press Clipping Bureau? A. Yes.

(Deposition of Donald Arden.)

“Q. Did you, in accordance with the practice that you have just described, of sending out pictures of persons taken at the Stork Club in New York, together with caption sheets, send to many of the newspapers in California such photographs and caption sheets? [81]

“A. Yes. Besides this, customers that attend at the Stork Club, stars of the cinema world, stage, political and, I would say, the Mayor and Congressmen of that state in the San Francisco area, I have sent pictures, and continue doing the practice if and when I know they are in the club.

“Q. Have you sometimes sent pictures of persons who attended the Stork Club with such caption, which pictures were not taken at the Stork Club?

“A. There can be a case where I didn't send it direct, but I did send pictures to different wire syndications, such as the Associated Press or Acme News or United Feature Syndication, or International News Photo. They, in turn, wire or send prints, from the print I sent to them, to all of the various states in the United States.

“Q. And have you seen such material that you so distributed, reproduced in the newspapers of California, and have you had clippings of such reproductions furnished to you by Romeike Press Clippings and Burrelle's Press Clipping Bureau?

“A. Yes, I have, and I see them every day as we look at the clippings when they arrive.

“Q. I show you four such clippings, which

(Deposition of Donald Arden.)

appear to have come and are reported by Romeike to have come, from newspapers indicated on the clipping sheets with the material so published, and ask you if those clippings are the four clippings from such newspapers so received by you from Romeike, bearing reference [82] to the Stork Club in New York? A. Yes, they are.

“Q. As to these, and all others of these clippings, which you have handed me, and which I propose now to offer, would you say the original photographs were taken at the Stork Club?”

“A. Yes, they were.

“Mr. Goldwater: I ask these four clippings be marked for identification, these being clippings from newspapers in California in December, 1940.

“(Four clippings thereupon marked Plaintiff’s Exhibit 24 for identification, 11/1/46.)”

Now, if your Honor please. I will show to Mr. Picard Plaintiff’s Exhibit 24 for identification. I talked to Mr. Picard a week or so ago about the necessity of repeating these original newspapers, and I believe he said that he would not require me to bring in the original newspapers. Is that correct, Mr. Picard?

Mr. Picard: That is correct.

Mr. Sullivan: Will it be stipulated that these newspaper clippings may be deemed to be admitted with the same full force and effect as if the original newspapers had been brought into court and a foundation established for it?

(Deposition of Donald Arden.)

Mr. Picard: Subject to the objection that these are all immaterial, irrelevant and incompetent.

Mr. Sullivan: Aside from that objection, with respect to [83] the presentation of the proof, will it be stipulated that these are true and accurate copies of the articles that appeared in the respective newspapers indicated by the attachment—by the attachment to the various clippings at or about the time indicated in the pink attachments.

Mr. Picard: I do not think that is quite correct. I think they are clippings from newspapers, but I object to them as immaterial, irrelevant and incompetent.

Mr. Sullivan: Will it be stipulated that they are clippings from the newspapers of the date appearing on the attachment to the clippings?

Mr. Picard: So stipulated.

The Court: They may be admitted and marked.

Mr. Sullivan: At this time may we offer these in evidence as Plaintiff's Exhibit 24, and for the convenience of your Honor, I have prepared an index for these, which, if I may, I would like to attach to them, so that it will be of some use to the Court in examining the exhibit?

The Court: Very well.

(The clippings from newspapers in California, in December, 1940, are marked Plaintiff's Exhibit 24.)

Mr. Sullivan: Resuming the reading of the deposition:

(Deposition of Donald Arden.)

“Q. I show you a group of clippings furnished by Romeike Press Clippings for the month of December, 1941, and ask you whether these are reproductions of photographs taken at the [84] Stork Club, with underwritings naming the Stork Club, which appeared in California newspapers during that month? A. Yes, they are.

“Mr. Goldwater: I offer these for identification.

“(Group of clippings, being ten in number, thereupon marked Plaintiff’s Exhibit 25 for identification, 11/1/46.)”

Not reading from the deposition, if your Honor please, at this time I will produce and I will show to Mr. Picard the clippings referred to as Plaintiff’s Exhibit 25 for identification along with an index sheet which I have prepared for your Honor’s convenience.

Mr. Picard: I will object to the majority of these, if your Honor please, as most of them are in Southern California.

The Court: I will allow them. It goes to the weight of the testimony.

Mr. Sullivan: Will it be stipulated with respect to Plaintiff’s Exhibit 25 for identification that they may be offered without the necessity of producing the newspapers themselves?

Mr. Picard: So stipulated.

Mr. Sullivan: And that the clippings are clippings of the newspapers indicated by the attachment at or about the date indicated on the attachment?

(Deposition of Donald Arden.)

Mr. Picard: So stipulated.

Mr. Sullivan: At this time Plaintiff offers Plaintiff's [85] Exhibit 25 for identification in evidence, and at the same time I will attach for the convenience of the Court an index or listing which I have prepared for your Honor's convenience.

The Court: They may be admitted and marked.

Mr. Sullivan: May I have these marked as one exhibit?

The Court: One exhibit.

(Romeike press clippings for month of December, 1941, are marked Plaintiff's Exhibit 25.)

Mr. Sullivan: Resuming the reading of the deposition:

"Q. I show you a group of 71 clippings from newspapers of photographs with underwritings mentioning the Stork Club attached, furnished by Romeike Press Clippings and Burrelle's Press Clipping Bureau, in accordance with your previous testimony, and ask you if those are clippings received by the Stork Restaurant of photographs taken at the Stork Club and reproduced in California newspapers upon the dates indicated on each?

"A. Yes, they are.

"Mr. Goldwater: I offer these for identification.

"Q. These are all in the year 1942?

"A. The date is shown by the clipping service.

"Mr. Goldwater: They all appear to be dated in 1942.

"(71 clippings referred to thereupon marked

(Deposition of Donald Arden.)

Plaintiff's Exhibit 26 for identification, 11/1/46.)”

I will at this time show to Mr. Picard a group of clippings which is marked Plaintiff's Exhibit 26 for identification, [86] November 1, 1946, which I produced here in Court along with a list that I have prepared for the clippings.

Mr. Picard: A lot of them are not even in the state of California.

Mr. Sullivan: Most of them are.

Mr. Picard: But there are some that are not. If your Honor please, I will object to all of these except those which are in San Francisco or the vicinity of San Francisco on the ground they are immaterial, incompetent.

Mr. Sullivan: If your Honor please, the theory of producing these is not only to show the prior widespread reputation of the Stork Club in San Francisco here but also throughout the whole United States, and particularly in California for the reason that a large number of patrons of the Stork Club are from the cinema and art colony in Southern California. These clippings indicate that the fame and the reputation of the Stork Club is spread throughout the entire state of California.

The Court: So that the record may be clear, state the purpose for the offer.

Mr. Sullivan: At this time the Plaintiff offers Plaintiff's Exhibit 26 for identification in evidence upon the following grounds, that the clippings from these newspapers, which I understand that counsel will agree are true and accurate clippings of the

(Deposition of Donald Arden.)

newspapers themselves, show that the Stork Club was known to the various communities in which the [87] respective papers were published; that the various communities were advised and were informed of the widespread reputation of the Stork Club and with the Stork Club's use of its name and in instances of its insignia; I am not too sure about the latter with respect to these clippings, but certainly the name was spread out and extended throughout the whole United States and particularly within the communities in which these newspapers were published; that furthermore, by so doing, in addition to expanding the reputation of the Stork Club, it was expansion of the patronage of the Stork Club, because by the mention of the Stork Club in these various papers prospective patrons of the Stork Club were induced through the advertisement and publicity in this particular medium, to become patrons of the Stork Club upon visits to New York.

The Court: Assuming your statement to be true, and assuming the theory of your case that you are presenting, and the purpose of this offer, how would they be affected by the Stork Club run here in San Francisco?

Mr. Sullivan: If your Honor please, the purpose of this evidence is to establish the fame and reputation and good will and name of the Stork Club in New York, and our theory of the case is that that name has become an asset, and the use of that name by other people will not only damage the

(Deposition of Donald Arden.)

good will and the name and the fame and reputation which has been built up by this tremendous advertising and publicity of the plaintiff in [88] this case; it will not only do that, if your Honor please, but it will, through the activities of the defendant which we will show to your Honor in this particular case, bring about a deception of the public, because the public has associated the name of the Stork Club with the organization which is in New York, with the business which is conducted at 3 East 53rd Street, New York, and the use of that name by other people will not only damage the business but it will cause the public, or it will be likely to cause the public to become confused, so that the public will think that other users of the name Stork Club and of the insignia which accompanies the Stork Club have some connection with the Stork Club that is in New York City.

So that there are two grounds, namely, an invasion of the property rights, of the good will, of an asset of fame and reputation, and secondly, there is the other unfair business practice, as we contend, that the public itself will be liable to some deception if it is permitted that other people use the name Stork Club.

The Court: I will hear from counsel.

Mr. Picard: If your Honor please, if the establishment in San Francisco was in any manner similar to the establishment in New York, there might be some reason to counsel's argument, but here at a distance of three thousand miles is a comparatively

(Deposition of Donald Arden.)

small bar and restaurant which does none of the things which counsel has attributed to the Stork Club in New York. He stated [89] that they have 244 employees. I take it, my client has about half a dozen employees. He has shown the various articles which are given away. The exhibits here show an elaborate place of business. The defendant's place is a comparatively small bar. It is impossible that anybody would be deceived into believing that the Stork Club in San Francisco is the Stork Club of New York. We do not use the stork, the insignia from which they claim they have built up a reputation. The only thing that is used is the name, the Stork Club, and I submit, if your Honor please, that none of the argument which was made here is applicable to the situation which exists in this case, a nightclub giving away hundreds or thousands of dollars of articles to their patrons, giving away hundreds of dollars in food and liquor to newspaper men, as compared with the small place in San Francisco which is not elaborate and which does not conduct the same type of business.

Mr. Sullivan: Might I say this: Counsel is not completely accurate in his statement that his client is not using the insignia, because the evidence will show—of course, counsel is just making statements. He is arguing from the present state of the record. We will show the use of this insignia, irrespective of whether they have discontinued the use of that insignia or not, and I think we can cite to Your Honor authority that if they did use the insignia

(Deposition of Donald Arden.)

and thereafter discontinued it, if the Plaintiff is to be given protection, the mere fact that part of [90] the unfair practice was discontinued by the defendant would not prevent or prohibit Your Honor from extending that protection against the use of the insignia by the defendant.

There is no question that they did use the insignia and we will prove it to this court.

Secondly, counsel talked about there being no confusion as between the establishment in New York City and the defendants' establishment. We will introduce evidence which will show that there is a liability to confuse, and I will submit to Your Honor cases in support of that contention.

The Court: You may proceed. I will allow it over the objection and subject to his motion to strike.

Mr. Sullivan: Plaintiff offers in evidence Plaintiff's Exhibit 26 for identification and along with them an index of the clippings which I have prepared and ask that Plaintiff's Exhibit 26 for identification be duly marked and admitted in evidence as one exhibit.

The Court: They may be admitted and marked.

Mr. Sullivan: Will it be stipulated that these clippings are clippings from the actual newspapers and that it will not be necessary for me to bring in the actual newspapers and that the clippings were in the newspapers at or about the time indicated on these pink slips attached.

Mr. Picard: So stipulated.

(Deposition of Donald Arden.)

(The 71 clippings referred to were marked Plaintiff's [91] Exhibit 26.)

Mr. Sullivan: I now resume the reading of the deposition if Your Honor please:

“Q. I show you another group consisting of 37 clippings, received from Romeike Press Clippings in New York, and ask you whether the photographs there appearing are reproductions of original photographs taken at the Stork Club, reproduced in the newspapers indicated as attached to each of these clippings? A. Yes, they are.

“Q. These are all in the year 1946, and the months and dates are indicated on each of the clippings? A. Yes.

“Mr. Goldwater: I ask these be marked.

“(37 clippings thereupon marked Plaintiff's Exhibit 27 for identification, 11/1/46.)”

Not reading from the deposition, if Your Honor please, I will submit to Mr. Picard at this time the clippings which have been marked Plaintiff's Exhibit 27 for identification, together with index which I have prepared for the convenience of the Court.

Mr. Picard: To which we will object on the ground, if Your Honor please, that none of them are from San Francisco and very few of them are in the vicinity of San Francisco and therefore immaterial, irrelevant and incompetent.

The Court: I will allow them under the same ruling. [92]

Mr. Sullivan: Plaintiff offers Plaintiff's Exhibit 27 for identification together with the index which

(Deposition of Donald Arden.)

I have prepared and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(37 clippings were marked Plaintiff's Exhibit 27.)

Mr. Sullivan: Mr. Picard, may we have the same stipulation with respect to Plaintiff's Exhibit 27 in evidence, eliminating the introduction of the actual newspapers.

Mr. Picard: Same stipulation.

Mr. Sullivan: Resuming the reading of the deposition:

"Q. Mr. Arden, do you know whether these clippings, which you have identified, represent all of the clippings received by Stork Restaurant of reproductions of photographs taken in the Stork Restaurant in the years which I have indicated, which reappeared in those newspapers, or do you know whether there are others which have also been received?

"A. There are many thousands of others that we have not received due to the fact that the clipping service claims that usually one picture out of ten, that appears in various papers, are picked up and sent to us by the clipping service itself and we have others, I would say, thousands and thousands of them in our files at the present time, which can be produced, if you wish to see them.

"Q. Each of these captions, which have been marked for identification, seems to be for only a

(Deposition of Donald Arden.)

portion of the years [93] mentioned. Were clippings of a similar kind received showing publications of photographs taken in the Stork Club, in California newspapers during other periods in each of those same years? A. Yes.

“Q. You have not attempted, now, to produce all of them, but simply samples for various short periods? A. That is correct.

“Q. Are your files available for inspection?

“A. Yes, they are.

“Q. For the many others that you say are there?

“A. Yes, they are.

“Q. Now reference has been made in Mr. Farrell's testimony to the use of postcards as an advertising and publicity medium by the Stork Restaurant. Do you know of your own knowledge of the use of thousands of such cards?

“A. Yes, I do. Postal cards were made of various dates. We had a postal card made one year, one card made up for each month of the year. We had twelve different postcards in that year. We sent each postal card to those on our mailing list, which consisted of various registers, of social registers, club lists, private movie listing, patrons that visited the Stork Club who gave their names as potential customers in the future, and who would like to be kept in the limelight of what the Stork Club is doing, and I have a list of some customers, and not only [94] customers, but to the names on our mailing list from the San Francisco area, to whom we sent postcards.

(Deposition of Donald Arden.)

“Q. You sent postcards to all of those people?

“A. Yes.

“Q. What years were those, if you remember?

“A. The exact year,—we sent literature, I would say, monthly, not one specific year, but I can tell you by looking at the cards, the postal cards, what year it was.

“Q. Would this Exhibit 6 for identification refresh your recollection as to the year in which the postal cards for each month that you described were made up and sent out?

“A. Yes. This is for 1941, which I was recalling about the postcard for each month.

“Q. When you say that you sent out literature and postcards to the various names on your mailing list, you don't mean that you sent out on each mailing to each of the 200,000 names on your mailing list? Did you use the entire mailing list for each item? A. Not for each item, no.

“Q. Were numerous of the items mailed during the past ten years to persons in the San Francisco area? A. Yes, the majority of the time.

“Q. You have in your hand a group of cards. Do you know how many names and addresses are contained on those cards?

“A. I can count them for you. (Witness doing so.) There [95] are 69 in this list of San Francisco people in the area, meaning four to ten miles in that district, such as Berkeley, Oakland, Alameda, Piedmont, San Mateo, Palo Alto, Burlingame,

(Deposition of Donald Arden.)

which are in the vicinity of ten or twelve miles of San Francisco.

“Q. Were these cards taken from your mailing list records? A. Yes, they were.

“Q. They are the original records as they appear in your mailing list files?

“They are the originals.

“Q. What do these represent?

“A. They represent part of our mailing list of potential visitors to the Stork Club.

“Q. How were these names obtained?

“A. They were obtained from social registers, from San Francisco, also from people who visited the Stork Club, and gave their names to the Stork Club for our mailing list when their pictures were taken.

Q. Do these represent the names of all people to whom you sent publicity matter in the general advertising and promotion of publicity for the Stork Club, in the vicinity of San Francisco?

“A. That is not a complete list. More of a complete list would be if we take the social register of San Francisco, and mailing it direct from that listing. [96]

“Q. Was that done on many occasions during the past ten years?

“A. Yes, that has been done numerous times.

“Mr. Goldwater: I offer the cards for identification.

“(Cards referred to thereupon marked Plaintiff's Exhibit 28 for identification, 11/1/46.)”

(Deposition of Donald Arden.)

At this time I will show Mr. Picard 69 cards which are Plaintiff's Exhibit 28 for identification bearing the date November 1, 1946, which I have produced.

Mr. Picard: Now, if your Honor please, I move that all references to the social register of San Francisco and names taken from the social register of San Francisco be stricken out on the ground that no social register has been produced, and I do not believe there is such a thing.

Mr. Sullivan: I do not know what the Social Register is by hearsay. I may be wrong, but I understand that there is a volume called the Social Register.

The Court: Unless you produce it, it will go out.

Mr. Sullivan: Yes.

We will offer Plaintiff's Exhibit 28 for identification in evidence, your Honor.

The Court: It may be admitted and marked.

(The cards referred to were marked Plaintiff's Exhibit 28.)

The Court: We will take an adjournment now until tomorrow morning. [97]

(An adjournment was here taken until Wednesday, April 2, 1947 at 10:00 A.M.) [98]

Wednesday, April 2, 1947. 10:00 A.M.

The Clerk: Stork Restaurant v. Zahati.

Mr. Sullivan: Ready.

Mr. Picard: Ready.

The Court: You may proceed.

(Deposition of Donald Arden.)

Mr. Sullivan: Resuming the reading of the deposition and the testimony of Mr. Arden, if your Honor please:

“Q. Mr. Arden, has the Stork Club and/or its managing director, in connection with the Stork Club and its employment there, been publicized in any other manner during recent years?

“A. Yes. Take, for example, the radio field. Sherman Billingsley has made personal appearances on such programs which are coast-to-coast, such as Rudy Vallee of NBC, local stations WEA, New York. They have an outlet of 142 stations.

“Q. Can you give the dates upon which such appearance was made?

“A. I have not the date at present, but it can be obtained from the studio. And there was a Duffy's Tavern which was an NBC network, WEA local, an outlet of 132 stations which Billingsley himself appeared in person, and as a guest artist.

Jinx Falkenberg show, WJZ program called “Blind Date” which ran for three years on the NBC network, WJZ local. They mentioned the Stork Club. All these mentioned are where Billingsley appeared and mentioned twice or three times during the program [99] which went coast-to-coast.

“Q. In introducing Mr. Billingsley, in each of these instances, in the course of the program, was it stated by the announcer that Mr. Billingsley was connected with, or was managing director of, the Stork Club in New York?

(Deposition of Donald Arden.)

“A. That is correct. And, another program, which was in 1945 and 1946, which was last New Year’s Eve, and which appeared on the NBC network, WJZ local. That was around-and-around the circuit of a New Year’s Eve, which began in London and then came to New York. Mr. Billingsley had an interview of four minutes. The interview was by Mr. Grant who introduced the Stork Club, Mr. Billingsley, and the activities of the Stork Club and the accommodations there, and what next year might bring.

“Then there were other programs such as the Chesterfield Supper Club, NBC hook-up, WEAf local, an outlet of 146 stations. Billingsley was also on that, in person.

“Q. Was the Stork Club mentioned?

“A. The Stork Club was mentioned at least six or eight times, coast-to-coast, over the air.

“Then there were other programs such as coast-to-coast, in which the Stock Club and Sherman Billingsley were mentioned. I can mention many of them, which I would like to.

“Q. All right, do so.

“A. There was the Bing Crosby program, NBC; Frank Sinatra, [100] CBS; Eddie Cantor, Sammy Kaye, Walter Winchell, Jack Benny, Bob Hope—

“Q. In all of these programs were there national hook-ups?

“A. These were all national hook-ups in which the Stork Club is mentioned and Billingsley is mentioned.

(Deposition of Donald Arden.)

“Then, during the war, we had Treasury War Bond Drives, which were on the radio, which were in the Stork Club itself, auctioneering Treasury Bonds for a drive for the government.

“Q. Was that on a national hookup?

“A. That was on a national hook-up.

“Q. Do you know over what locals?

“A. ABC.

“Q. That was broadcast—

“A. ABC is WJZ. Then, also, the magazine sections which are weeklies, such as Look Magazine, Life Magazine, Pic, Click, Newsweek. Billingsley and the Stork Club are mentioned with picture layouts, in such magazines as Life and Look.

“Q. Have you some of these magazines?

“A. I have not got them on display here at the moment. They can be produced, if necessary.

“Then, the monthly magazines, such as Good Housekeeping, Vera Caspary wrote a story called “Murder at the Stork Club.” It gained such reputation that it was now brought into a book form. The Stork Club is mentioned through the entire story.

“Q. Have you got the issues of Good Housekeeping magazine? [101] A. Yes, I have.

“Q. Are these the ones? A. Yes.

“Q. Are these the issues of December 1945 and November 1945? A. That is right.

“Mr. Goldwater: I offer these magazines containing two installments of the story called ‘Murder

(Deposition of Donald Arden.)

at the Stork Club,' and ask they be marked for identification.

“(Issue of Good Housekeeping Magazine, thereupon marked Plaintiff’s Exhibit 29-A for identification; issue of December 1945 thereupon marked Plaintiff’s Exhibit 29-B for identification, 11/1/46.)”

At this time, if your Honor please, not reading from the deposition, but addressing the Court, I have at this time here in court and I will submit to Mr. Picard Plaintiff’s Exhibit 29-A and 29-B for identification which are the issues of Good Housekeeping magazine mentioned by the witness Mr. Arden (showing).

At this time Plaintiff offers in evidence, if your Honor please, Plaintiff’s Exhibit 29-A and Plaintiff’s Exhibit 29-B for identification, and asks that they be duly admitted and marked.

The Court: They may be admitted and marked.

(Two issues of the Good Housekeeping magazine marked [102] Plaintiff’s Exhibit 29-A and 29-B.)

Mr. Sullivan: May I, for the purpose of the record, indicate that the article mentioned by the witness, “Murder at the Stork Club,” is Plaintiff’s Exhibit 29-A beginning at Page 30, and may I also indicate that Plaintiff’s Exhibit 29-B is the last installment of “Murder at the Stork Club” beginning on Page 41.

(Deposition of Donald Arden.)

Resuming the reading of the deposition, if your Honor please:

“Q. You have described this story as having now been published in book form. I show you this volume published by the Detective Book Club, One Park Avenue, New York, purporting to contain three stories, one of which is described as “The Murder in the Stork Club,” by Vera Caspary. Is that the publication in book form to which you referred?”

“A. That is correct.

“Mr. Goldwater: I ask that be marked for identification.

“(Said book thereupon marked Plaintiff’s Exhibit 30 for identification, 11/13/46.)”

Addressing myself to your Honor and not reading from the deposition, I produce here in court Plaintiff’s Exhibit 30 which is the Detective Book referred to by the witness Mr. Arden. There are three stories in this book and this is the last one.

Plaintiff offers Plaintiff’s Exhibit 30 for identification, [103] If your Honor please, and asks that it be admitted and marked.

The Court: It may be admitted and marked.

(Volume published by Detective Book Club is marked Plaintiff’s Exhibit 30.)

Mr. Sullivan: Resuming the reading of the deposition, if your Honor please:

“Q. Is there anything else?”

“A. In that book the author, Caspary, mentions names. Those names happen to be frequent cus-

(Deposition of Donald Arden.)

tomers of the Stork Club. Some of the names are Ed Kelly——

“Q. Who is Ed Kelly?

“A. Mayor Edward Kelly of Chicago. Also Sonia Henie, the skater; Mrs. Woolworth Donahue, society leader; Jack Dempsey, ex-champion of boxing; Mr. and Mrs. John Jacob Astor, one of the leading figures in society; Jim Farley, political leader; Eli Culbertson, bridge expert; Mary Martin, stage and screen star; Mr. and Mrs. Henry Ford II, he is the head of Ford Motor, Limited; Al Jolson, star of screen and stage; Alfred Gwynne Vanderbilt, society leader and national horse sportsman; Carole Landis, screen movie queen; Walter Winchell, tops and commentator of newspaper reporting.

“Q. You mean his column has a wider circulation than any other columnist in the United States?

“A. Yes, sir. Walter Winchell has an outlet of 800 newspapers in his syndication, in which we are mentioned at least [104] four times a week.

“Also J. Edgar Hoover, head of the F.B.I.; Steve Hannegan, tops in the advertising game; George Jean Nathan, movie critic; Julie Hayden, stage star; Ann Sheridan, vivacious screen star; Phil Baker, radio star; and many others.

“Q. Are all of these people who have been mentioned frequent visitors and in regular attendance at the Stork Club?

“A. Yes, we call them steady customers.

“Q. You mean, when they are in New York they

(Deposition of Donald Arden.)

go to the Stork Club regularly for dinner or for supper? A. That is correct.

“Q. Did you say whether or not this story mentions Sherman Billingsley once or more than once?

“A. All through the entire story he is mentioned.

“Q. Would you say dozens of times?

“A. Many more than that. We have a Stork Club book. It is a book that was written by Lucius Beebe.

“Q. Have you got that?

“A. I have a cover on that, and produced by Rhinehart Company, and the Stork Club is paid 15 per cent for the use of the name ‘Stork Club.’”

“Q. Is that book now in publication?

“A. That book will be on the stands on November 15th or 20th for sale.

“Q. Is this the book cover that was submitted to the Stork [105] Restaurant, Inc., the operator of Stork Club in New York, for its approval?

“A. Yes, that is right.

“Mr. Goldwater: I ask that be marked for identification.

“(Book cover thereupon marked Plaintiff’s Exhibit 31 for identification, 11/1/46.)”

At this time, if your Honor please, I will show to Mr. Picard the book cover which is Plaintiff’s Exhibit 31 for identification (showing).

At this time, if your Honor please, plaintiff offers Plaintiff’s Exhibit 31 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Deposition of Donald Arden.)

(The book cover is marked Plaintiff's Exhibit 31.)

Mr. Sullivan: If your Honor please, subsequent to the deposition to which we are referring, I was able to obtain the actual book called "The Murder in the Stork Club." I will show Mr. Picard that book, which was not present at the deposition, and just yesterday I learned from two responsible book shops in San Francisco that they had that book, and I am wondering if we could stipulate, Mr. Picard, that it be introduced in evidence.

Mr. Picard: It may be so stipulated.

The Court: It may be admitted and marked.

(The book, "Murder in the Stork Club," was marked [106] Plaintiff's Exhibit 31-A.)

Mr. Sullivan: Resuming the reading of the deposition:

"A. (Continuing): Then we have the Stork Club picture which Paramount Pictures paid for the rights of using the name 'Stork Club.' That has appeared—and these figures have been as of a month ago, when I called Mr. Wilkie of Paramount Publicity. They told me it appeared in 13,000 theatres and there were, roughly, 16,000 in the United States and Canada.

"Q. In the picture, 'The Stork Club,' do you know what the sets portrayed?

"A. Yes. They were an exact duplicate replica of the Stork Club in New York City.

"Q. Was the front of the Stork Club in New

(Deposition of Donald Arden.)

York City shown in that picture? A. Yes.

“Q. Also the entrance?

“A. Yes, the entrance, the interior.

“Q. As well as the coatroom?

“A. Yes, and the dancing room——

“Q. Also the kitchen?

“A. The kitchen and the office, and it also had an actor who played the part of Mr. Sherman Billingsley himself.

“Q. Did you see the picture?

“A. Yes, I did.

“Q. Were the sets as reproduced in that picture accurate [107] representations of the Stork Club front, the Stork Club interior, and various parts of it as they exist in the Stork Club in the City of New York?

“A. Yes. In fact, a little incident I can bring up, when they were shooting a scene at the bar, it was brought to the attention that the bar was just two inches higher than the exact duplicate of the Stork Club, and they were in favor of having the exact dimensions, and the entire scene was changed.

“Q. Do you know what movie star appeared in that picture?

“A. Betty Hutton played the leading part.

“Q. Is Miss Hutton a regular patron at the Stork Club?

“A. She is a regular patron, and it is almost a ‘must’ on her list when she is in New York City.

“Q. Was there a very prominent male character in that picture?

(Deposition of Donald Arden.)

“A. Yes, a man who played the part of Sherman Billingsley himself—Bill Goodwin.

“Q. Who was the other principal male character in the picture? A. Barry Fitzgerald.

“Q. Is he also a frequent patron of the Stork Club?

“A. Yes. Barry Fitzgerald is a frequent patron and so is Bill Goodwin.

“Then we had March of Time which made a short called ‘Night Club Room.’ Leonard Lyons, a New York columnist, who [108] has a syndicated column, besides being local New York commentator, spoke over the March of Time. It was a short, and he said the Stork Club is the best and most publicized night club in the entire world.

“Q. Are you familiar with that short, the ‘March of Time’? A. Yes, I have seen it.

“Q. It is a regular release, is it not?

“A. It is a regular release, and which was released by March of Time.

“Q. When was the Stork Club picture released?

“A. In 1945.

“Q. And the March of Time short that you spoke of, when was that?

“A. In 1946. Then we had the Pathe News, another news reel company, which showed exclusive scenes and goings-on at the Stork Club itself, which was released to the general public as a news reel.

“Q. What year was that?

“A. I have not the exact year, but I can get it for you.

(Deposition of Donald Arden.)

“Q. Was that picture called or known as ‘Pathe on Parade’? A. That is correct.

“Q. And that was run for approximately twenty minutes?

“A. That is right. And at the present time, we have a fashion show which is sponsored by the Cosmopolitan Magazine. Newsreels are taken at each meeting, monthly, and they in turn [109] will be shown to the public. That is a new feature.

“Q. Do you know by what news company that will be released?

“A. I think they are dickering right now for the release.

“Q. Can you give us the names—not all—of any number of well known columnists whose regular writings are released in various newspapers in the United States, in so-called columns, who are frequent visitors of the Stork Club?

“A. Yes, I can. Walter Winchell; he is a steady patron, nightly, at the Stork Club. He has an outlet of syndication of his column to 800 newspapers in the United States, and we are mentioned at least four or five times weekly.

“Leonard Lyons, another columnist. He has an outlet syndication of 200 newspapers, in which we are mentioned at least 3 or 4 times weekly.

“Dorothy Kilgallen; we are mentioned in that column four or five days a week.

“Q. In which paper is that?

“A. She writes for the Journal-American, New

(Deposition of Donald Arden.)

York City, a Hearst organization, and distributed by the Hearst newspapers.

“Q. Does her column appear in the various Hearst organization papers throughout the country?

“A. Yes.

“Q. And many others which are not under the Hearst publication control?

“A. That is right. Then we have the society field, which [110] plays a large part in New York in the society world, called Cholly Knickerbocker, who writes for the Journal-American. That, in turn, is released by the Hearst organization to various Hearst newspapers throughout the country.

“Q. Is the column syndicated for other papers as well?

“A. I am not sure of that. Then there is Louis Sobol, who writes for the Journal-American.

“Q. Is that a syndicated column?

“A. For the Hearst publications. There are others like Damon Runyon, Bill Corum, Westbrook Pegler, E. V. Durling, Arthur Bugs Baer, Danton Walker, Nick Kenny, Dan Parker, Barclay Beekman, Nancy Randolph, Charles Ventura, and Jimmy Jemail.

“Q. What paper is he connected with?

“A. He is with the Daily News, which has a circulation of three to four million daily, and five and a half million on Sunday.

“Q. Is he a frequent patron of the Stork Club?

“A. He is a frequent patron, yes.

(Deposition of Donald Arden.)

“Q. Does his column mention the Stork Club frequently, and has it in years past?

“A. In years past, yes. Then we have Ed Sullivan, another columnist; Hedda Hopper, who has a syndicated column.

“Q. Well, now, Mr. Arden, generally what has been the policy of the Stork Club in New York with respect to its relations with these persons who write columns that are circulated [111] so widely in the press of the country?

“A. We give them a free hand while in the Stork Club to visit us at any time of the day without any reservations necessary. They are given items by myself and whoever else they may know in the Stork Club itself.

“Q. I understand your general policy is to interest them in coming as frequently as possible so as to procure as frequent mention of the Stork Club as possible in these widely circulated columns?

“A. That is right.

“Q. In other words, the Stork Club policy is to curry favor with these columnists in the interest of the publicity of the Stork Club?

“A. That is correct.

“Q. Have there been any particular advertising campaigns that the Stork Club has engaged in its publicity program?

“A. Yes. There was a time where, in conjunction with Arthur Kudner, who is head of an advertising firm, and I believe Buick is one of his accounts. There was a car given, and a picture of

(Deposition of Donald Arden.)

that car was taken in front of the Stork Club canopy with Clem McCarthy seated behind the wheel, he being the radio commentator. That was used nationally.

“Q. You mean it was used in the national advertising of the Kudner agency for the Buick automobile?

“A. That is correct. Then Chesterfield cigarettes—they [112] took a picture of one of the hat-check girls in the Stork Club, with a tray of Chesterfields. That campaign was used over the entire country, and posters were made in color, which were used in subways, on newsstands, and drug stores. That also was on a back cover of a program in New York City, which appeared in every theatre.

“Q. Was that photograph used in any national advertising besides the posters that you speak of? In other words, what I mean is, did it appear in any magazine that was nationally distributed?

“A. It appeared in all the main large magazines throughout the entire country.

“Q. Will you name some of them that it appeared in?

“A. In *Cosmopolitan*, *Look*, *Life*.

“Q. You say that showed the Stork Club in New York, or it was taken in the Stork Club?

“A. It was taken at a studio, and it announced Sherman Billingsley's Stork Club in New York City.

“Q. You mean, in the advertising, mention was

(Deposition of Donald Arden.)

made of Sherman Billingsley's Stork Club in New York City? A. That is correct.

“Q. Was the girl, who appeared in this ad, in uniform? A. Yes, she was.

“Q. What uniform did she wear?

“A. She wore a black and white outfit which the girls who [113] work at the Stork Club as cigarette girls wore. Her name was Mary Schnier, for identification.

“Q. Do you know whether the Stork Club in New York has been mentioned favorably in many radio programs by prominent radio stars?

“A. Yes, they have on every program, national program—not every program, but the majority of programs.

“Q. Will you name some of the stars, for example, on whose program the Stork Club in New York has been mentioned?

“A. Bob Hope, who was a star on Pepsodent; Bing Crosby, who starred for Kraft Phoenix Cheese; Frank Sinatra for Old Gold Cigarettes; Rudy Vallee, for Drene Shampoo; Eddie Cantor for Pabst Beer; Walter Winchell for Jergens Lotion; Jack Benny for Lucky Strike, and numerous others.

“Q. Do you know of a program of Jimmy Durante, in which the Stork Club was mentioned?

“A. Yes. Jimmy Durante mentioned it many times. I can't recall who the sponsor was.

“Q. Fred Allen?

(Deposition of Donald Arden.)

“A. Fred Allen, the comedian, mentioned it many, many times.

“Q. Mr. Arden, how long have you been in the publicity field? A. Ten years.

“Q. Would you say, from your experience in that business, that there is a publicity value in a night club having its name [114] mentioned in the column of well known columnists, and in news and society items in newspapers and magazines throughout the country? A. Yes, by all means.

“Q. Is there any way that you can measure the value of such mention?

“A. Yes, by clipping service which we subscribe to.

“Q. You mean that would give you, not the dollar value, but what you might term publicity value? A. That is correct.

“Q. In your opinion, has the mention of the Stork Club, in the connections in which you have described it, in the columns, both news columns and publicity columns, in the newspapers, in advertising, in magazines, in newsreel shorts, in the newsreel picture, in the story, ‘Murder in the Stork Club,’ in both Good Housekeeping Magazine and in book form, and all of the other publicity, which you have described of the Stork Club in New York, operated by the Stork Restaurant in New York, the plaintiff in this proceeding, been of great value to the plaintiff herein? A. By all means, yes.”

Mr. Picard: I object to that question on the grounds it is incompetent, irrelevant and immate-

(Deposition of Donald Arden.)

rial, and calling for the conclusion of the witness, a matter for the Court to determine. I move to strike out the answer. [115]

Mr. Sullivan: We resist that motion. If your Honor please, the theory of presenting that evidence through that question and calling for that answer which is in the deposition here is this, that Mr. Arden is a man who has operated in the field of publicity for ten years, and speaking as a publicity expert and speaking from his experience in particular with the public in the Stork Club, he is qualified to testify not only as to his opinion based upon his experience but as to the effect of the value of the publicity of the Stork Restaurant.

The Court: It goes to the eight of the testimony. I will allow it.

Mr. Sullivan: The deposition then says: "Colloquy off the record," and then continues:

"The Witness: I would like to stress a point on pictures.

"Q. You may proceed.

"A. I take many pictures that run into the thousands during the entire year, and those pictures are distributed, and are in demand by photo syndications in New York City and all movie magazines, which pictures appear daily, weekly and monthly. I would say that I send out, at least a thousand pictures a month for publication for reproduction.

"Q. Have you seen a very large percentage of these pictures republished in newspapers and magazines and other publications?

(Deposition of Donald Arden.)

“A. Yes, I have. [116]

“Q. Invariably is credit given to the Stork Club by mention on the republication of these photographs?

“A. All photographs, when used, use the words ‘Stork Club.’

“Q. These practices that you have described, the mentions in publicity, in columns, and by photographs in newspapers, and so forth, matters of just the last year or two, or are you describing the practices in relation to your publicity for the Stork Club over a long period of years?

“A. I would say over a long period of years that practice has been the same.

“Mr. Goldwater: That is all, Mr. Aden.”

Mr. Picard: (Reading.)

“Mr. Frank: I have no questions but I would like to have marked for identification the wine list of the Stork Club which you handed me, Mr. Goldwater.

“Mr. Goldwater: I have no objection to its being marked as Defendants’ Exhibit A for identification.

“(Wine list of Stork Club referred to thereupon marked Defendants’ Exhibit A, for identification, 11/1/46.)”

At this time, if your Honor please, not reading from the deposition, I will offer in evidence the wine list which has been referred to as Defendants’ Exhibit A for identification, and I will hand it to Mr. Sullivan for his examination.

The Court: It may be admitted and marked.

(Deposition of Donald Arden.)

(Wine list of the Stork Club was marked
Defendant's Exhibit A.)

Mr. Picard: Proceeding with the deposition,
your Honor:

“Mr. Frank: I would like to have marked a
menu card of the Stork Club of New York, and
ask it be marked for identification.

“(Menu card of the Stork Club of New York
thereupon marked Defendants' Exhibit B for iden-
tification, 11/1/46.)”

At this time I will offer in evidence Defendants'
Exhibit B for identification, the menu card re-
ferred to.

The Court: It may be admitted and marked.

(The menu card was marked Defendants'
Exhibit B.)

Mr. Sullivan: May I put a witness on, your
Honor?

The Court: Yes.

Mr. Sullivan: The plaintiff will call Mr. Mac-
donald.

C. E. MACDONALD

called for the plaintiff, sworn.

The Clerk: Will you state your name to the
Court? A. C. E. Macdonald.

Direct Examination

By Mr. Sullivan:

Q. Where do you live, Mr. Macdonald?

A. 2430 Kirkham Street, San Francisco.

(Testimony of C. E. Macdonald.)

Q. What is your occupation?

A. Manager of the Fox Theater.

Q. The Fox Theater is located in San Francisco?

A. Yes.

Q. Incidentally, how does the Fox Theater with respect to size, compare to other theaters in this vicinity?

A. It is the largest one in this vicinity.

Q. Do you know its capacity as to the size compared to the theaters in the United States?

A. Well, I believe it is approximately between third and fifth in the United States.

Mr. Macdonald, are you familiar with the motion picture known as "Stork Club"? A. Yes.

Q. The motion picture of "The Stork Club," was that exhibited at the Fox Theater?

A. Yes.

Q. During what dates, or between what dates was that picture exhibited at the Fox Theater?

A. From December 20 to December 30, 1945.

Q. And was there a regular and continuous showing of it during that period? A. Yes.

Q. What do you mean by that, Mr. Macdonald? Can you explain that?

A. We opened at 10:45 in the morning and closed at 12:30 or 1:00 o'clock at night.

Q. Did that include Sundays, too? [119]

A. Seven days a week.

(Testimony of C. E. Macdonald.)

Q. I notice that Christmas Day comes in that period. Would that include Christmas Eve?

A. Yes.

Q. Now, Mr. Macdonald, I subpoenaed you to bring here records of the attendance at the Fox Theater with relation to the picture, "Stork Club." Have you brought those records? A. Yes.

Q. Have you those records now in your hands?

A. Yes.

Q. While you are testifying? A. Yes.

Q. Mr. Macdonald, do you keep in the regular course of business records of the admissions at the Fox Theater of the various pictures that are exhibited there?

A. We do it by daily report and by weekly report.

Q. Is it part of the regular course of your business to keep such records? A. Yes.

Q. And are the records which you have there the permanent records of the admissions and the number of admissions to the particular picture at the Fox Theater? A. That is right.

Q. Would you refer, please, to the records which shows the number of admissions to the picture, "The Stork Club," at the [120] Fox Theater in San Francisco during that course of time?

A. We opened on Thursday, December 20, 1945, and during the first week's run, starting Thursday to Wednesday, we run to 59,615 people.

Q. During that period of time, namely, from Thursday, December 20, to Wednesday, December

(Testimony of C. E. Macdonald.)

26, 1945, was the picture "The Stork Club" exhibited during the performance at the Fox Theater?

A. That's right.

Q. Now as to the other records of the showing of this picture.

A. From the 27th to and including the 30th, which was on a Sunday, and then we changed shows on the 31st.

Q. When you say from the 27th you mean of December 1945 to December 30, 1945?

A. Yes.

Q. What was the total number of paid admissions for that period?

A. For that period we played to 25,648.

Q. Have you computed the total number of paid admissions during the showing of the motion picture, "Stork Club," from its first showing on or about December 20 or 21, 1945, to and including December 30, 1945?

A. Yes. 83,729.

Q. And are your records which you have been reading from here [121] of the paid admissions to the motion picture, "The Stork Club," made and kept under your supervision and direction?

A. That is right.

Q. Are the entries therein made within a short time after the figures are compiled from where you compile them?

A. They are compiled on Wednesday and mailed to the office on Thursday.

Q. Where do you get the information for those figures?

A. From our box office reports.

(Testimony of C. E. Macdonald.)

Q. As a matter of fact, do you use the figures which you have just read to us as the basis for the payment of the federal taxes? A. Yes.

Mr. Sullivan: No further questions.

Cross-Examination

By Mr. Picard:

Q. Mr. Macdonald, did you actually see the picture itself? A. Yes, I did.

Q. And in seeing the picture itself, did you observe the Stork Club as it was filmed therein?

A. As I remember, there was a picture of the Stork Club.

Q. Have you ever seen the place of business at 200 Hyde Street in San Francisco which is operated by the defendants in this case?

Mr. Sullivan: Just a minute. I will object to this [122] question and this line of inquiry on the ground it is not proper cross-examination.

The Court: The objection will be sustained.

Mr. Picard: That is all.

Mr. Sullivan: That is all. May the witness be excused, your Honor?

The Court: He may be excused.

Mr. Sullivan: At this time, if your Honor please, plaintiff will offer in evidence the testimony of Mr. Sherman Billingsley which was taken pursuant to notice at the same time and place as the deposition of Mr. Arden which I have heretofore indicated for the purpose of the record, and plaintiff offers said testimony by reading it from the deposition into the record at this time.

“Mr. Goldwater: I will now call Mr. Sherman Billingsley.

“SHERMAN BILLINGSLEY,
called as a witness on behalf of the plaintiff, having first been duly sworn by the Notary, testified as follows:

“The Notary: Please state your name and address.

“The Witness: Sherman Billingsley, 1130 Park Avenue, New York City.

“Direct Examination

“By Mr. Goldwater:

“Q. Mr. Billingsley, you are associated with the Stork [123] Club? A. Yes, sir.

“Q. In what capacity?

“A. As managing director.

“Q. Have you been the managing director of the Stork Club since August 1934?

“A. Yes, sir.

“Q. Prior to that, were you the managing director of the clubs known as Stork Restaurant Corporation, and 53 East 51st Street Corporation?

“A. Yes, sir.

“Q. Did those two last mentioned corporations operate in New York City a club known as the Stork Club? A. Yes, sir.

“Q. When they ceased business, were all of the assets of the corporation, including the name and good will of the Stork Club, transferred to Hazel Billingsley? A. Yes, sir.

“Q. Is she your wife? A. Yes, sir.

“Q. Is she the sole stockholder of Stork Restau-

(Deposition of Sherman Billingsley.)

rant, Inc., the present operator of the Stork Club?

“A. Yes.

“Q. Were all of these assets transferred to the Stork Restaurant, Inc., in exchange for its capital stock? [124] A. That is right.

“Q. Is the insignia, which appears on the various exhibits here, offered for identification, the insignia presently used by Stork Restaurant, Inc., of the Stork Club in New York? A. Yes, sir.

“Q. Has that insignia been used consistently and continuously since August 1934?

“A. Yes, sir.

“Q. Was it used by the two predecessor companies mentioned prior to that time?

“A. Yes, sir.

“Q. What business is operated by Stork Restaurant, Inc., in New York under the name of Stork Club?

“A. The business is that of the Stork Club.

“Q. What is the nature of the business?

“A. Restaurant where food and drinks are served and dance music is furnished.

“Q. What, in general, is the type of food served and the character of the patrons who frequent the Stork Club?

“A. The very best food, very best liquor, and the very finest people that can afford the prices of the type at the Stork Club.

“Q. Do you make it a practice of catering to such persons and encouraging their return to the club? A. Yes, that is right. [125]

(Deposition of Sherman Billingsley.)

“Q. What methods generally do you use to encourage the return of these people and their constant patronage?

“A. Well, what we do is, we cater to big names in whatever line they are, such as the biggest people from different states and cities to come to the Stork Club, and we take their pictures and we interview them and then, in turn, we send those pictures and their interview to their local papers, and sometimes to syndications that cover other states, too. By doing that, we take for instance, the Governor or Mayor or United States Senator of a state and send his picture from New York City and the Stork Club to his home town or local paper, and 99 chances out of 100 his local paper will see it, and the people who elected him to office see that he goes to the Stork Club in New York and they, in turn, go to the Stork Club.

“Q. Has the Stork Restaurant, Inc., expended large sums of money for publicity in pursuing this policy of advertising and establishing a general reputation?

“A. Yes, it has a tremendous amount of money that has been spent. As a matter of fact, I think we spend too much. I think our value is more in the money we spend that way than what we put in the bank. In other words, I think our good will is worth more than the money.

“Q. More than the tangible assets?

“A. Yes. I think our assets are in good will.

“Q. You think that is your chief asset? [126]

(Deposition of Sherman Billingsley.)

“A. Yes. Every time we turn around we are offered money for the use of the name.

“Q. Mr. Billingsley, when people of prominence do patronize the Stork Club, do you pursue a general policy of complimenting them in some fashion in order to interest them in returning?

“A. Yes, we continually try to build up our good will. We send them in little presents or souvenirs that we can think of. We used to have to think of them, but today the different companies offer them to us.

“Q. And are the numerous favors of one kind and another, such as lipsticks and the automobile tags, and other things that have been marked for identification here, illustrative of the methods you have used in order to continue the interest of your patrons at the Stork Club as a restaurant and night club institution?

“A. Yes. The only difference is the things you have here are very small and minor in comparison to the things we have given out. We have given out automobiles, and we have given out thousand dollar bills, and we have given out five hundred dollar bottles of perfume, and we have given out thousands of thirty-five dollar bottles of perfume which, of course, isn't the amount that we pay for them. We buy it at wholesale prices, but the retail price is \$35. We send to Hollywood, around the holidays, either Christmas, or the like, five hundred or one thousand bottles of perfume that would retail for \$35 a bottle, to the picture stars and writers.

(Deposition of Sherman Billingsley.)

“We send to all the United States Senators for Christmas some kind of Christmas present, and to the Congressmen and all of the Governors in the United States, and all the Mayors of the largest cities. Maybe it will be a pair of red suspenders as a gag, or a necktie, or a tricky tie. We continue to let them know there is a Stork Club in New York City, and we are after them, and we get them.

“Q. As a result of this policy, has the Stork Club succeeded in inducing a very large number of these people to patronize it when they come to New York?

“A. Yes, that is right. I would say that 70 per cent of our business is out of town business, and I would say 30 per cent is a steady New York City business, and most of the New York City business consists of people who live here and come in every night, which makes us sort of a show for the out of town people. In other words, when people come to the Stork Club from out of town, the first thing they want to know is—they want to see something. They heard of Walter Winchell, who is our No. 1 customer, and they want to get a look at him, and want to know where Johnny Weissmuller sat the night he had an argument with some Naval Lieutenant, or which table J. Edgar Hoover sits at; and that is part of the show that they expect. They want to see the so-called debutantes and the society [128] people, and Counts and Lords, and this, that and the other.

“Q. You would say, then, that the Stork Club

(Deposition of Sherman Billingsley.)

receives its patronage not only from local people, but from a substantially large number of people from out of town?

“A. I would say—my guess would be, at least 70 per cent.

“Q. Is it from any particular section of the country that the out-of-towners come?

“A. We get them from the entire United States. We get a lot of people from outside of the United States. We work very hard to get in the California people because of the picture people that are there.

“Q. Have you been present during the testimony which was given here in the depositions of Mr. Farrell and Mr. Arden? A. Yes, sir.

“Q. Are you thoroughly familiar with the methods which they have described, with the expenditures which they have described, with the various gifts which they have described as having been distributed, and the publicity which they described for which the Stork Club has paid?

“A. Yes, I heard all of them.

“Q. You have general supervision of all of the business at the Stork Club, have you not?

“A. That is right.

“Q. You are its directing head?

“A. Yes. [129]

“Q. And, all of this business, which they have described, including all of its publicity and advertising programs are under your supervision?

“A. That is right.

(Deposition of Sherman Billingsley.)

“Q. And you are familiar with them all?

“A. Yes.

“Q. If you were asked each and all of the questions which were presented to these witnesses, with respect to the expenditures, the distribution and the publicity, newspaper and otherwise, to which these witnesses have testified, would you answer the same as they have answered? A. Yes.

“Q. Mr. Billingsley, do you know of your own knowledge that all of these gift items, the purchase of which were described by Mr. Farrell, and the cost of which has been testified to, were actually distributed to patrons of the Stork Club in its general advertising and publicity programs?

“A. I directed the giving away of all of that. I told whom to give them to, and when, and how. I saw them given away. Part of them I gave away with my own hands, or I told the Captain to give something away. I watched them give those things away, such as the matches. We used to send a box of those, I think, monthly by Western Union to every star in Hollywood, every producer, writer, and all of the Hollywood people. A box of matches contained 50 packs. They were shipped direct from the Lion Match Company to the Western Union in Hollywood, and the Western Union delivered it to the people, and then Mr. Arden explained the way they were mailed in asbestos packages that the Government permitted through the mail. We send those things all the time. The Stork Club's name is men-

(Deposition of Sherman Billingsley.)

tioned and when we want to remind a customer, we send them a box of matches.

“Q. You are able to testify that all of these expenditures were actually made for the purposes described by Mr. Farrell, and that the articles were actually distributed without compensation to patrons of the Stork Club, or prospective patrons of the Stork Club, in this general publicity and advertising policy of the Stork Club?

“A. Yes, I can swear to that.

“Q. Mr. Billingsley, did you with the assistance of counsel negotiate a contract for the use by DeSilva Productions, Inc., of the name ‘Stork Club’ for the moving picture which was made and distributed under that name? A. Yes.

“Q. Do you know whether or not a cash consideration was paid under that contract to the Stork Club for the use of its name? A. Yes.

“Q. Have you any objection to naming the amount that was paid? A. Not at all. [131]

“Q. What was the amount that was paid?

“A. The first deal we made was for \$100,000, reduced it to \$27,500, which was paid to us. We actually got \$27,500. We got money from the news- actually got \$27,500. We got money from the news- papers for doing two pieces for them.

“Q. Suppose you tell us about it.

“A. That is all there is to it. We didn’t get a lot of money, but we did two big pieces for them.

“Q. What were those pieces?

“A. About night clubs, the history of night

(Deposition of Sherman Billingsley.)

clubs, and how they are run, and their receipts and the taxes they pay, and all that.

“Q. The Stork Club was paid for it?

“A. I was paid for it, personally.

“Q. Was the Stork Club mentioned in those articles? A. Yes.

“Q. The name ‘Stork Club’ was used?

“A. Yes. It was mentioned, and it was known that I, who built the Stork Club, did the article.

“Q. You are described as the person in the Stork Club?

“A. Yes. That is the reason they picked me to do it..

“Mr. Goldwater: That is all.”

Mr. Picard: I will read the cross-examination.

“Cross-Examination

“By Mr. Frank:

“Q. Are you at the present time operating any restaurant [132] or night club in California known as the Stork Club? A. No.

“Q. Are you interested in any restaurant or night club in California at the present time?

“A. No.

“Q. I am advised by counsel there is a restaurant in Los Angeles, California, which you are interested in. A. No.

“Q. Is my information correct?

“A. No, it is not.

“(Colloquy off the record.)

“Q. What you just said applies also to any restaurant or night club in California managed, or

(Deposition of Sherman Billingsley.)

in which there is an interest on the part of the Stork Restaurant, Inc.?

“A. Neither myself nor the Stork Restaurant has any interest in anything in California—night clubs, restaurants, or anything.

“Q. During the period before 1934, when the present corporation was formed, the nature of the business conducted by you on behalf of these other corporations was that which was commonly called a speakeasy?

“Mr. Goldwater: That is objected to as immaterial and irrelevant.”

Mr. Sullivan: At this time, if your Honor please, I will object to the question as being immaterial, irrelevant and [133] incompetent as to whether the former place of business was called a speakeasy or not.

The Court: It would not enter into the merits.

Mr. Picard: I do not think it is very material in view of the witness' answer anyway.

The Court: Very well.

Mr. Picard: Shall I read the answer?

The Court: You may.

Mr. Picard: The answer is “No.”

“Q. Were you selling liquor during that period?

“A. I never sold any.

“Q. Was it sold in the premises or part of the business that those two prior corporations conducted?

“Mr. Goldwater: That is objected to.”

Mr. Sullivan: I will add the further objection,

(Deposition of Sherman Billingsley.)

on the ground that it is immaterial, irrelevant and incompetent, that it is not binding on this plaintiff, which is a definite legal entity, and neither of the two corporations that were mentioned by the witness, and I would like to renew my objection further to the last question which had to do with the name of speakeasy being applied to the prior corporation upon the further legal ground that such a question is not binding on this plaintiff, which is a different legal entity than the other two corporations.

The Court: I will sustain the objection. It may go out. [134]

Mr. Sullivan: May the answer of "No" to the other question go out, your Honor?

The Court: That may go out.

Mr. Picard (reading):

"Q. Were there any proceedings of any kind brought by any Government agency against those two corporations, which were the predecessors of the present Stork Restaurant in connection with the business which is operated at the same premises?"

Mr. Sullivan: That is objected to on the ground it is immaterial, irrelevant and incompetent and not binding upon this plaintiff, which is a different legal entity.

The Court: I will sustain the objection.

Mr. Picard (continuing reading):

"What was the result of those charges?"

"Mr. Goldwater: Objected to as immaterial and irrelevant."

(Deposition of Sherman Billingsley.)

Mr. Sullivan: I object to that upon the same grounds as was indicated to the last question.

The Court: Same ruling.

Mr. Picard (reading):

“Q. Have you any recollection as to where those proceedings were brought?”

“Mr. Goldwater: That is objected to as immaterial and irrelevant.”

Mr. Sullivan: Same objection, if your Honor please.

The Court: The same ruling. [135]

Mr. Picard (reading):

“Q. Or, as to what particular time they were brought?”

Mr. Sullivan: The same objection.

The Court: The objection is sustained.

Mr. Picard (reading):

“Mr. Frank: That is all.

“Mr. Goldwater: That is all.” [136]

Mr. Sullivan: If your Honor please, we have concluded the reading of the New York depositions, and I have here a large number of reproductions from newspapers and magazines which I have spoken to Mr. Picard about, and which I think we could agree upon without burdening the court excessively with the establishment of these through witnesses. I have the first group here and I will show them to Mr. Picard. I think I showed them to you yesterday.

Mr. Picard: Yes, I saw them.

Mr. Sullivan: Will it be stipulated, Mr. Picard,

that with respect to these various issues of Time Magazine and Life Magazine, which I have here, and which I have indicated to you, may be introduced into evidence with the same force and effect as if the original records of Time and Life Magazines had been brought here; in other words, will it be stipulated that these are copies of Time and Life Magazines for the dates that they bear on them, and that they were distributed in this area?

Mr. Picard: I will so stipulate subject to the objection that they are immaterial, irrelevant, and incompetent.

Mr. Sullivan: With the exception of that objection, that they may be introduced in evidence?

Mr. Picard: Yes.

The Court: They may be admitted and marked subject to counsel's objection. [137]

Mr. Sullivan: If your Honor please, plaintiff offers in evidence at this time a copy of Time Magazine dated June 5, 1935, and ask that it be admitted and marked Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Time Magazine dated June 5, 1939, was marked Plaintiff's Exhibit 32 in evidence.)

Mr. Sullivan: In connection with that for the assistance of the court, may I respectfully refer your Honor to page 40 of Plaintiff's Exhibit 32, wherein mention is made of the Stork Club.

At this time, if your Honor please, plaintiff offers in evidence an issue of Time Magazine dated Jan-

uary 15, 1940, and ask that it be duly admitted and marked as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Time Magazine dated January 15, 1940, was marked Plaintiff's Exhibit 33.)

Mr. Sullivan: In connection with Plaintiff's Exhibit 33 in evidence, if your Honor please, may I, for the assistance of the court, indicate that reference and mention is made of the Stork Club and Mr. Sherman Billingsley on page 42 of that exhibit.

At this time, if your Honor please, plaintiff offers in evidence a copy of Time Magazine dated September 21, 1942, [138] and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Time Magazine dated September 21, 1942, is marked Plaintiff's Exhibit 34.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 34 in evidence, if your Honor please, may I for the assistance of the court indicate that the reference to the Stork Club appears on page 84 of this issue of Time Magazine.

At this time, if the Court please, plaintiff offers in evidence an issue of Time Magazine dated August 9, 1943, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Time Magazine dated August 9, 1943, is marked Plaintiff's Exhibit 35.)

Mr. Sullivan: Referring to Plaintiff's Exhibit

35 in evidence, if your Honor please, and for the assistance of the court may I indicate that the reference to the Stork Club appears on page 19 of Plaintiff's Exhibit 35 in evidence.

At this time, if your Honor please, the plaintiff offers in evidence an issue of Time Magazine dated March 26, 1945, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Time Magazine dated March 26, 1945, is marked Plaintiff's Exhibit 36 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 36 in evidence, may I, for the assistance of the court, indicate [139] that the reference to Stork Club appears on page 50 of that magazine.

At this time, if your Honor please, plaintiff offers in evidence a copy of Life Magazine dated January 2, 1939, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Life Magazine dated January 2, 1939, is marked Plaintiff's Exhibit 37 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 37 in evidence, if the Court please, may I for the assistance of the court indicate that the reference to or mention of Stork Club appears at page 52 of that magazine.

Plaintiff at this time offers in evidence an issue of Life Magazine dated December 31, 1937, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Life Magazine dated December 31, 1937, was marked Plaintiff's Exhibit 38 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 38 in evidence if the Court please, for the convenience of the court may I indicate that the reference to Stork Club occurs on page 84 of that magazine.

Plaintiff offers in evidence, if the Court please, an issue of Life Magazine dated October 21, 1940, and asks that it be duly admitted and marked. [140]

The Court: It may be admitted and marked.

(Life Magazine dated October 21, 1940 is marked Plaintiff's Exhibit 39.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 39 in evidence, if the Court please, may I indicate that the mention of the Stork Club occurs on page 119 of that issue.

Plaintiff at this time offers in evidence, if the Court please, an issue of Life Magazine dated August 26, 1940, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Life Magazine dated August 26 is marked Plaintiff's Exhibit 40.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 40 in evidence, if your Honor please, may I, for the convenience of the court, indicate that the reference to or mention of Stork Club occurs on page 39 of that issue.

Plaintiff offers in evidence, if the Court please, an issue of Life Magazine dated May 10, 1943, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Life Magazine dated May 10, 1943 is marked Plaintiff's Exhibit 41.)

Mr. Sullivan: For the convenience of the court may I indicate that the reference to or mention of Stork Club appears on page 71 of Plaintiff's Exhibit 41 in evidence. [141]

Plaintiff offers in evidence an issue of Life dated January 17, 1946, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Life Magazine dated January 17, 1946 is marked Plaintiff's Exhibit 42 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 42 in evidence, may I indicate to the Court that the reference or mention of Stork Club appears on page 88 of that exhibit.

Plaintiff offers in evidence, if your Honor please, an issue of Life Magazine dated November 6, 1944.

The Court: It may be admitted and marked.

(Life Magazine dated November 6, 1944 was marked Plaintiff's Exhibit 43 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 43 in evidence, may I particularly indicate to your Honor that there is, beginning at page 119, an entire article in Life Magazine entitled, "Life Visits the Stork Club."

Plaintiff offers in evidence, if the Court please, an issue of Life Magazine dated June 24, 1946 and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Life Magazine dated June 24, 1946 was marked Plaintiff's Exhibit 44.)

Mr. Sullivan: In connection with Plaintiff's Exhibit 44 in evidence, may I indicate to your Honor an advertisement mentioning [142] the name of the Stork Club, and pertaining to Chesterfield Cigarettes, which was mentioned by the witness, Mr. Arden, which appears opposite page 38 in the magazine.

Now, Mr. Picard, I have here the other magazines that I spoke to you about, and may I have the same stipulation with respect to these, in other words, that save for the objection that you referred to as to Time and Life, it will be stipulated that these will be introduced without the necessity of otherwise establishing them and that they were circulated in this area?

Mr. Picard: So stipulated.

Mr. Sullivan: At this time, if the Court please, plaintiff offers in evidence an issue of Collier's Magazine dated October 1, 1938, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Collier's Magazine dated October 1, 1938 is marked Plaintiff's Exhibit 45, in evidence.)

Mr. Sullivan: In connection with Plaintiff's Ex-

hibit 45 in evidence, may I respectfully call your Honor's attention to mention made with respect to Stork Club in an article appearing on page 15 and entitled, "Have you a reservation?" by Clinton Reynolds.

Plaintiff offers in evidence an issue of the American Magazine dated June, 1941, and asks that it be duly admitted and marked. [143]

The Court: It may be admitted and marked.

(American Magazine dated June, 1941, is marked Plaintiff's Exhibit 46 in evidence.)

Mr. Sullivan: Q. In connection with Plaintiff's Exhibit 46 in evidence, may I refer your Honor particularly to the mention made of Stock Club and the photograph in connection therewith which appears in an article beginning on page 44, entitled, "Sherman Packs Them In."

Plaintiff offers in evidence, if the Court please, a copy of the New Yorker, dated March 6, 1943, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(New Yorker dated March 6, 1943, is marked Plaintiff's Exhibit 47 in evidence.)

Mr. Sullivan: In connection with Plaintiff's Exhibit 47 may I refer your Honor to page 56, to an article entitled, "The Army Life. Word From Mr. Billingsley."

Plaintiff offers in evidence a copy of the American Mercury dated September, 1944, and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(American Mercury dated September, 1944, is marked Plaintiff's Exhibit 48 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 48 in evidence, I direct your Honor's attention to an article entitled, [144] "Inside the Stork Club," beginning and appearing on page 357.

Plaintiff offers in evidence copy of the Saturday Evening Post dated June 22, 1940 and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The Saturday Evening Post dated June 22, 1940, is marked Plaintiff's Exhibit 49 in evidence.)

Mr. Sullivan: Referring to Plaintiff's Exhibit 49 in evidence, may I direct your Honor's attention to the same advertisement of Chesterfield Cigarettes put out by Liggett & Myers Tobacco Company, which mentions "Sherman Billingsley's famous Stork Club in New York," appearing on the inside of the pack cover.

Plaintiff offers in evidence, if your Honor please, a copy of Collier's Magazine dated July 13, 1940, and asks that it be admitted and marked.

The Court: It may be admitted and marked.

(Collier's Magazine dated July 13, 1940 is marked Plaintiff's Exhibit 50 in evidence.)

Mr. Sullivan: Plaintiff respectfully indicates to the court the same advertisement which was men-

tioned by the witness Mr. Arden, which appears on the outside of the back cover of that exhibit.

Plaintiff offers in evidence a copy of Look Magazine, dated February 4, 1947, and asks that it be duly admitted and marked. [145]

The Court: It may be admitted and marked.

(Look Magazine dated February 4, 1947 was marked Plaintiff's Exhibit 51 in evidence.)

Mr. Sullivan: In connection with Plaintiff's Exhibit 51 in evidence, we respectfully call your Honor's attention to an article beginning on page 62, entitled, "The Truth About the Stork Club."

Now, Mr. Picard, I think you have seen these photographic reproductions which I had made by the printer of the San Francisco Call.

The Court: Why can't they go in as one exhibit?

Mr. Sullivan: Yes, I had done this before I left my office this morning in order to assist your Honor. I had an index prepared which I will have out here. May I when that index comes out attach the index?

The Court: Very well.

Mr. Sullivan: Mr. Picard, will it be stipulated that these reproductions, photographic reproductions of the column of Walter Winchell, from the San Francisco Call-Bulletin may be admitted in evidence, with the full force and effect as if the original newspapers were brought here to court?

Mr. Picard: Yes, subject to the objection that they are immaterial, irrelevant, and incompetent.

Mr. Sullivan: Will it *be that* the San Francisco

Call was circulated in this area and has been for many years? [146]

Mr. Picard: So stipulated.

Mr. Sullivan: Plaintiff offers in evidence, if the Court please, nine sheets of photograph reproductions of articles of Walter Winchell from the San Francisco Call, all of them in the year 1938, and ask that they be admitted and marked Plaintiff's Exhibit next in order.

The Court: They may be admitted and marked.

(Photographic reproductions of articles of Walter Winchell from the San Francisco Call in the year 1938 marked Plaintiff's Exhibit 52, in evidence.)

Mr. Sullivan: May we, with respect to these exhibits, if your Honor please, have it understood, and Mr. Picard, may we have it understood that the respective dates which appear on the sheets which were stamped on there by the printer from the various newspapers represent the dates of the particular articles?

Mr. Picard: So stipulated.

Mr. Sullivan: May I indicate to the court that in some of these articles the dates appear on the headline, in others it appears in longhand writing of the printer on the reverse side of the article, and on the larger sheets the date has been stamped on with a date stamp.

Plaintiff offers in evidence 12 sheets of photo-static reproductions or prints or photographic reproductions of the column of Walter Winchell from

the San Francisco Call-Bulletin for [147] the year 1939, and asks that they be duly admitted and marked.

The Court: They may be admitted and marked.

(Photograph reproductions of column of Walter Winchell from San Francisco Call-Bulletin for year 1939 are marked Plaintiff's Exhibit 53 in evidence.)

Mr. Sullivan: Plaintiff offers in evidence 9 sheets of photographic reproductions of the column of Walter Winchell in the San Francisco Call-Bulletin, appearing in the San Francisco Call-Bulletin on the dates designated as stated, and ask that they be marked Plaintiff's Exhibit next in order.

The Court: They may be so marked.

(Photographic reproductions of column of Walter Winchell in the San Francisco Call-Bulletin are marked Plaintiff's Exhibit 54, in evidence.)

Mr. Sullivan: Plaintiff offers in evidence four sheets of photographic reproductions of columns of Walter Winchell "On Broadway," appearing in the San Francisco Call-Bulletin on the dates indicated as stated, and ask that they be duly admitted and marked as one exhibit.

(Photographic reproductions of column of Walter Winchell "On Broadway" appearing in San Francisco Call-Bulletin are marked Plaintiff's Exhibit 55, in evidence.)

Mr. Sullivan: Plaintiff offers in evidence three sheets of photographic reproductions of the column entitled "Winchell On Broadway," appearing in the San Francisco Call-Bulletin, [148] and ask that they be duly admitted and marked.

The Court: They may be admitted and marked.

(3 sheets of Photographic Reproductions of the column entitled "Winchell on Broadway, appearing in San Francisco Call-Bulletin were marked Plaintiff's Exhibit 56 in evidence.)

Mr. Sullivan: If your Honor please, it was found more convenient to take a column and photograph it and transfer it with respect to the following sheets, which I am going to ask be admitted in evidence.

I will now offer a set of columns of Walter Winchell, shown in 5 columns on one photographic reproduction, and bearing an identifying mark, a red No. 6 on the reverse side and ask that they be marked as Plaintiff's Exhibit Next in order.

The Court: They may be admitted and marked.

(Photographic reproduction of Walter Winchell's columns bearing the identifying mark "6" on the reverse side is marked Plaintiff's Exhibit 57 in evidence.)

Mr. Sullivan: Plaintiff offers in evidence a large photographic reproduction of 7 columns of Walter Winchell "On Broadway" from the San Francisco

Call-Bulletin on the dates indicated and bearing an identifying mark of "7" on the reverse side thereof, and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Large photographic reproductions of Walter Winchell's columns bearing identifying mark "7" on the reverse side is marked Plaintiff's Exhibit 58 in evidence. [149])

Mr. Sullivan: Plaintiff offers in evidence and asks that it be duly admitted and marked a photographic reproduction of five columns of Walter Winchell On Broadway, appearing in the San Francisco Call-Bulletin on the dates indicated, and which sheet bears an identifying mark of the figure "8" on the reverse side thereof.

The Court: It may be admitted and marked.

(Photographic reproduction of 5 columns of Walter Winchell on Broadway, in San Francisco Call-Bulletin, bearing the identifying mark of the figure "8," marked Plaintiff's Exhibit 59 in evidence.)

Mr. Sullivan: Plaintiff offers in evidence a photographic reproduction of 5 columns of Walter Winchell On Broadway appearing in the San Francisco Call-Bulletin on the date indicated on the reproduction and bearing the identifying mark "9" on the reverse side thereof, and ask that it be admitted in evidence.

The Court: It may be admitted and marked.

(5 columns of Walter Winchell On Broadway in San Francisco Call-Bulletin bearing the identifying mark "9" is marked Plaintiff's Exhibit 60 in evidence.)

Mr. Sullivan: Plaintiff offers in evidence photographic reproduction of 6 columns of Walter Winchell On Broadway appearing in San Francisco Call-Bulletin on the dates therein indicated, and bearing the further identifying mark "10" on [150] the reverse side thereof and ask that it be admitted and marked.

The Court: It may be admitted and marked.

Photographic reproduction of 6 columns of Walter Winchell On Broadway appearing in San Francisco Call-Bulletin with identifying mark "10" on the reverse side is marked Plaintiff's Exhibit 61 in evidence.)

Mr. Sullivan: Plaintiff offers in evidence a photographic reproduction of 6 columns of Walter Winchell appearing in the San Francisco Bulletin on the dates indicated on the photographic reproduction and bearing the further identifying mark of a red figure "11" on the reverse side thereof and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Photographic reproduction of 6 columns of Walter Winchell appearing in the San Francisco Call-Bulletin bearing the identification

mark of "11" on the reverse side thereof, marked Plaintiff's Exhibit 62 in evidence.)

Mr. Sullivan: Plaintiff offers in evidence a photographic reproduction of 7 columns of Walter Winchell appearing in the San Francisco Call-Bulletin on the dates indicated on the photographic reproduction and bearing the further identification mark on the reverse side thereof of a red figure "12" and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Photographic reproduction of 7 columns of Walter Winchell appearing in San Francisco Call-Bulletin bearing the identifying mark on the reverse side of the figure "12" marked as Exhibit 63.)

Mr. Sullivan: At this time, if your Honor please, plaintiff offers in evidence the testimony of George A. Smith, which was taken by deposition duly noticed. The deposition was taken at our office, namely, the office of Malone & Sullivan, Room 849 Mills Building, San Francisco, on Friday, February 21, 1947, before George Gillin, a Notary Public. I do not think it will be necessary, will it, Mr. Picard, to read the three and a half or four pages preceding the testimony, relative to the stipulation of counsel?

Mr. Picard: I will be willing to stipulate that the deposition may be offered and deemed as read.

Mr. Sullivan: I do not want to burden the court with reading it, but on the other hand I will do

whatever the court desires. I have always felt it would be better to have depositions read.

The Court: You may read it.

Mr. Sullivan: May the record show that it was agreed that this deposition did not have to be signed, read, or corrected by the witness, and that stipulation was entered into by both parties and made a part of the record.

Mr. Picard: That is correct. It was taken by stipulation [152] at the date set out, at the convenience of counsel for plaintiff.

Mr. Sullivan: And that a waiver was made pursuant to the Rules of Civil Procedure with respect to the waiver of signature, by both the witness and by counsel?

Mr. Picard: So stipulated.

Mr. Sullivan: May the record show that I now offer in evidence as testimony on behalf of the plaintiff the testimony of George A. Smith. I will read starting on page 4:

“GEORGE A. SMITH,

called as a witness on behalf of plaintiff, and having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Sullivan: Q. Will you state your full name?

A. George A. Smith.

(Deposition of George A. Smith.)

Q. What is your present address?

A. Home address?

Q. Yes.

A. 915 North Crescent Drive, Beverly Hills.

Q. Your occupation is what?

A. Sales Manager.

Q. You are connected with what firm or corporation?

A. Paramount Pictures, Incorporated.

Q. What is your position with the Paramount Pictures, Incorporated? [153]

A. I supervise the distributing branches of our company in the western part of the United States, everything west of Chicago.

Q. Would that mean that you cover the territory of all the States west of Chicago?

A. Yes, sir.

Q. Do you cover in addition to any of that territory on continental United States any of the territory of the United States outside?

A. Alaska and the Hawaiian Islands.

Q. May I ask how long you have been associated or connected with Paramount Pictures?

A. Celebrating my twenty-fifth anniversary this year.

Q. Have you, during that time devoted a good portion of it to sales work? A. Entirely.

Q. How long have you been the Western Division Sales Manager for Paramount Pictures?

A. 6 years this month.

Q. May I ask your office address?

(Deposition of George A. Smith.)

A. 1513 West Twentieth Street, Los Angeles.

Q. Do you also have another office address in connection with this work? A. I do. [154]

Q. What is that, please?

A. In New York, 1501 Broadway.

Q. Are you familiar with a motion picture, or a motion picture production, called *The Stork Club*.

A. I am.

Q. Who produced that picture?

A. Paramount.

Q. What, approximately, was the cost of it?

A. The last cost sheet I saw ran close to \$1,700,000.

Q. Who distributed *The Stork Club*?

A. Paramount.

Q. Do you know who the stars were in that picture?

A. Yes, sir, Betty Hutton and Barry Fitzgerald.

Q. Did you ever see the motion picture called *The Stork Club*? A. Yes, sir.

Q. Incidentally, have you ever been in and upon the premises known as *The Stork Club*, which is located at 3 East Fifty-third Street, in the City of New York? A. Many times.

Q. Are you familiar generally with the interior of those premises? A. Very.

Q. When you saw the motion picture called *The Stork Club*, did you see any scenes or replicas of scenes of the interior of a place called in the picture *The Stork Club*? [155]

(Deposition of George A. Smith.)

A. Yes, sir. It was an exact replica, made from photographs.

Q. Did you ever see the set in The Stork Club?

A. Yes, sir. I happened to be on the stage when they were actually making the picture.

Q. Where were they?

A. In our studio in Hollywood.

Q. As you saw the sets on that occasion, did they appear to you to be fair and accurate replicas of the interior of the Stork Club, and identical? By the Stork Club, I mean the place located at 3 East Fifty-third Street, in New York City.

A. Yes.

Q. When was the motion picture called The Stork Club released, if you know?

A. Our national release date was December 28, 1945.

Q. After it was released, was it distributed throughout the United States? A. Yes, sir.

Q. Can you state without referring to the records which you have brought here, just as a preliminary, can you state as to the number of States in which The Stork Club motion picture was distributed?

A. All States of the United States, Alaska, and Hawaiian Islands.

Q. You have brought with you, I see, certain records? A. Yes, sir. [156]

Q. What records have you brought, Mr. Smith?

A. I have, first, the sales classifications of all

(Deposition of George A. Smith.)

of the pictures that were released by Paramount during that particular releasing year, 1945-46. I have a weekly report—a liquidation report showing the number of theatres, nationally, in which all of the pictures released during that year were played, and the accumulated dollar total film rental for all of the pictures for which all of these engagements, and I have—That report is for the week ending February 18. I have for the current week ending February 22—this report being prepared several days in advance, a record from the San Francisco branch showing the number of exhibition of Stork Club in the Northern California territory serviced by our San Francisco Branch, and the total dollar film rental from the exhibitions of The Stork Club in the Northern California territory.

Q. Mr. Smith, I will ask you at this time to refer to the document which relates to the nation-wide distribution of pictures which were released during the year 1945 and——

A. (Interrupting): 1945-46.

Q. 1945-46. What is the title of that document? Will you please read it there?

A. 'National Picture Report, United States Only, For 1945-46 Productions, Group A-5.'

Q. And will you read the parenthesized caption under the title, [157] please?

A. 'Paramount Pictures, Incorporated, and Paramount Film Distributing Corporation.'

Q. Is that the document to which you just referred in your testimony as indicating the nation-

(Deposition of George A. Smith.)

wide distribution or exhibition of certain pictures?

A. Yes, sir.

Q. Is this document one of the records of Paramount Pictures, Incorporated? A. Yes, sir.

Q. Is it a record made in the regular course of business of Paramount Pictures, Incorporated?

A. Yes, sir.

Q. And is it a part of the regular course of business of the Paramount Pictures, Incorporated, to make records such as that which you have before you at the time that the various data comes into Paramount Pictures, or within a reasonable time thereafter?

A. This is summarized each week for the previous week's business and is a weekly report issued to the division manager.

Q. This would be the latest report and summary?

A. Yes, sir.

Q. I notice on this document which you have before you that you have certain columns with certain captions on them. Will you please, for the purpose of the record, explain what [158] these columns are, by just reading them? Don't explain them in your own language.

A. First, we have the production number of each picture.

Q. That is, it appears on here as 'production number'?

A. Production number.

Q. The next column reads what?

A. Code title assigned to each picture for con-

(Deposition of George A. Smith.)

venience in wiring about it. Instead of wiring the full title, we assign a code to each picture.

Q. That reads, 'Code Title'? A. Yes.

Q. What does the next column read?

A. 'Stars.' The leading players in the cast.

Q. The next column, what does that read?

A. Under 'Current week,' and the week is dated, and sub-headings under 'Current week' would be the number of shipments during that current week: The net dollar rentals during that week; and the dollar credits during that week.

Q. Will you please read the exact column description which you find in that column or set of columns you have just testified to?

A. As to——

Q. Just what it says here with respect to 'Current week.'

A. I don't understand the question.

Q. Will you read what appears here, beginning with 'Current [159] week,' and coming down to the end of the column.

A. The number of shipments, the net dollar rentals, and the dollar credits.

Q. Over those columns appear the words 'Current week, February 15'?

A. February 15, 1947.

Q. That is correct? A. Yes.

Q. The next column reads what?

A. 'Accumulated to February 15, 1947.'

Q. The next column?

A. Under 'Accumulated' we have the number of

(Deposition of George A. Smith.)

shipments, and the net dollar rental, and the dollar credits.

Q. Mr. Smith, do you find any entries made with respect to the nation-wide distribution or exhibition of the motion picture called The Stork Club on the document to which you have just referred?

A. Yes, sir.

Q. Will you point out to me, please, where that appears? A. (Pointing.)

Mr. Sullivan: Let the record show that the witness has indicated the eighth line down on the document to which he is referring.

Q. Mr. Smith, I will ask you to read the entry which you have just pointed out, adding no words of your own, but merely [160] giving the columnar heading first and the entry as it appears opposite the picture of the Stork Club."

Mr. Picard: I will object to that question on the ground that the proper foundation has not been laid for it, that it is taken from a book which is obviously according to the witness' own testimony not a book of original entry, and that the witness has not testified that it was made under his supervision.

The Court: The objection will be sustained.

Mr. Sullivan: If your Honor please, I would like to refer your Honor to the title of the United States Code which authorizes the admission in evidence of such a record.

The Court: The objection goes to the foundation for the testimony.

Mr. Sullivan: That is what I am speaking of, the foundation.

The Court: It is time to take a recess now and you can take it up when you come back.

(A recess was here taken until 2:00 o'clock p.m.)

Afternoon Session, 2:00 P.M.

Mr. Sullivan: If your Honor please, I have a short witness, and may I, with the consent of your Honor and Mr. Picard, put him on out of order?

Mr. Picard: That is agreeable.

The Court: Very well.

EMMETT KEEFE

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name to the Court?

A. Emmett Keefe.

Q. (By Mr. Sullivan): What is your address?

A. 55 St. Elmo Way.

Q. By whom are you employed?

A. Twentieth Century Fox Film Corporation.

Q. Is that corporation engaged in the production and distribution of motion pictures?

A. Yes, it is.

Q. Are you familiar with a motion picture known as March of Time's Night Club Boom?

A. Yes, I am.

(Testimony of Emmett Keefe.)

Q. Who produced that picture?

A. That was produced by De Rochemont.

Q. Who distributed that picture? [162]

A. Twentieth Century Fox Film Corporation.

Q. Is it still being distributed?

A. Yes, it is.

Q. Can you tell us what the picture generally has to do with?

A. The picture generally deals with the boom of night clubs in New York City and shows many of the different night clubs in New York City.

Q. Have you seen the picture, Mr. Keefe?

A. Yes.

Q. Does that picture show anything purporting to be scenes having to do with the Stork Club of New York City? A. Yes, it does.

Q. Now, has that picture been released in this area? A. Yes, it has.

Q. And distributed in this area? A. Yes.

Q. Are you able to state at how many theatres, approximately, it has been distributed?

A. I would say approximately 390.

Q. Could you indicate to his Honor generally the area through which that picture has been distributed?

A. Yes, the distribution out of San Francisco goes as far north as Klamath Falls, takes in parts of Nevada, including Yerrington, and goes as far down as a few miles above Bakersfield.

Mr. Sullivan: If your Honor please, may I have

(Testimony of Emmett Keefe.)

this [163] marked as Plaintiff's Exhibit for identification next in order?

The Court: Very well.

(Exhibitors' Campaign Sheet was marked Plaintiff's Exhibit 64, for Identification.)

Q. (By Mr. Sullivan): Mr. Keefe, I show you Plaintiff's Exhibit 64 for Identification, which purports to be a document entitled "Exhibitors' Campaign Sheet," and I will ask you if you have seen this document before.

A. Yes, I have.

Q. You gave it to me, did you not?

A. Yes, I did.

Q. Is that document distributed by Twentieth Century Fox, to your knowledge, in connection with the picture, "March of Time"?

A. It is distributed out of Chicago from the March of Time office, and our office here receives a supply which we give to our exhibitors.

Q. You know with respect to your supply it is distributed out of your office? A. Yes.

Q. This comes from the files of your supply?

A. Yes.

Mr. Sullivan: I offer this in evidence, may it please your Honor.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 64 for Identification was thereupon received in evidence.) [164]

Mr. Sullivan: No further questions.

Mr. Picard: No questions. May the witness be excused?

The Court: Yes.

Mr. Sullivan: At the time we introduced the photographic reproductions of Winchell's columns in the San Francisco Call-Bulletin, which I am advised have exhibit numbers from 52 inclusive to 63 inclusive, I indicated to your Honor that for the convenience of the court and the record that I would furnish typewritten indexes indicating the various sheet numbers and the paragraphs in which I mentioned there were references to the Stork Club. I will show them to Mr. Picard and may I hand them to Mr. Welsh and may he affix those to the respective exhibits?

The Court: Very well.

Mr. Sullivan: Your Honor, before the noon recess, had before you an objection of Mr. Picard to the testimony of Mr. George Smith that was pertinent to the establishment of certain records that Mr. Smith brought to the deposition with him, and had to do with this motion picture of The Stork Club. Mr. Picard's objection, if I recall, your Honor, was directed to the fact that the witness had not testified that the records were permanent entries, or the entries were not made under the supervision and direction of the witness.

I would like at this time to answer Mr. Picard's objection and to advise the court, if I may, respectfully, of the section [165] which I had in mind in the United States Code.

The Court: Read the question in the deposition to which he objected.

Mr. Sullivan: The question, your Honor, to which Mr. Picard objected was on page 11:

“Q. Mr. Smith, I will ask you to read the entry which you have just pointed out, adding no words of your own, but merely giving the columnar heading first and the entry as it appears opposite the picture of the Stork Club.”

I would like to point out to your Honor that before I asked Mr. Smith that question I asked this question of Mr. Smith—

Mr. Picard: Where are you starting?

Mr. Sullivan: I am now referring to page 9 of the deposition at line 4:

“Q. Is that the document to which you just referred in your testimony as indicating the nation-wide distribution or exhibition of certain pictures? A. Yes, sir.

Q. Is this document one of the records of Paramount Pictures, Incorporated?

A. Yes, sir.

Q. Is it a record made in the regular course of business of Paramount Pictures, Incorporated? A. Yes, sir. [166]

Q. And is it a part of the regular course of business of the Paramount Pictures, Incorporated, to make records such as that which you have before you at the time that the various data comes into Paramount Pictures, or within a reasonable time thereafter?

A. This is summarized each week for the

previous week's business, and is a weekly report issued to the Division Manager.

Q. This would be the latest report and summary?
A. Yes, sir."

The Court: What is your objection?

Mr. Picard: My objection, if your Honor please, was that it is not the original entry. He says it is summarized each week for the previous week's business, summarized from original records. Secondly, he does not testify that the books or records were made under his supervision.

Mr. Sullivan: Are you through?

Mr. Picard: Yes.

Mr. Sullivan: This is the answer I was prepared to make to Mr. Picard's objection. As your Honor heard my preliminary questions, you can appreciate that I looked up the section before I examined the witness. In 1936, your Honor, Congress enacted the so-called Federal Shop Book Rule of Evidence, which was enacted for various reasons, upon the insistence of the United States Attorney General because of the technical objections [167] somewhat like those of Mr. Picard's in some criminal cases, and they ended up with the general rule that all he had to establish from a witness are the questions and answers to the questions that I asked the witness, and the objection does not go to the admissibility but the weight.

The Court: The books were there?

Mr. Sullivan: The records were there and photographic reproductions are attached to the deposi-

tions, and secondly, I say, your Honor, that that is a proper foundation, because of the language of this section. May I read it to your Honor?

The Court: Certainly.

Mr. Sullivan: I am reading now from Section 695 of 28 U. S. Codes, which was enacted in 1936. This does not appear in the bond volume but in the Supplement:

“In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of said act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memoranda or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of [168] the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to effect its weight but they shall not affect its admissibility.”

The Court: You refer to some memoranda that were not available?

Mr. Sullivan: Oh, no, I had it right there, and they are attached to the deposition, and I have duplicate photostats to introduce here.

The Court: This morning I thought it referred to records that were being testified to that were not available.

Mr. Sullivan: No, what happened at the deposition was, Mr. Keith, an associate of Mr. Picard, was present, and the witness was some distance from his office, and had these records, and asked if he could take them back with him, and so I wanted to introduce the evidence by having him read them into the record, and then at the end of the deposition, Mr. Keith and I agreed that photostats might be made and the originals sent back to the witness.

The Court: That goes to the weight of the testimony.

Mr. Picard: It would seem that way.

Mr. Sullivan: Will your Honor excuse me a moment?

The Court: Yes.

Mr. Sullivan: If your Honor please, yesterday Mr. Picard, I think, questioned the existence of a social register, and your [balance of paragraph missing]

MARIE SHANNON

called as a witness on behalf of plaintiff, sworn.

Q. (By the Clerk): Will you state your name to the court? A. Marie Shannon.

Direct Examination

By Mr. Sullivan:

Q. You are employed by the San Francisco Public Library? A. Yes, I am.

Q. And you are at the main branch of that library, are you? A. Yes.

Q. A subpoena was served on the main library today to bring to court the 1941 and 1935 Social Registers of San Francisco? A. Yes.

Q. Isn't that correct? A. Yes.

Q. Have you brought those two volumes with you? A. Yes.

Q. Will you kindly show them to his Honor?

A. Yes (handing).

Q. These books which you have shown to his Honor are a part of the regular records of the library in San Francisco, are [170] they not?

A. Yes.

Mr. Sullivan: Might I call your Honor's attention to the fact that these are books published by the Social Register, 381 Fourth Avenue, in New York City, so they would probably be available to the plaintiff. I introduce these two because they were mentioned I think by the witness Donald Arden and Mr. Picard expressed some skepticism.

(Testimony of Marie Shannon.)

Q. You have a record of complete social registers, haven't you, for some years?

A. I think we would have, I don't know.

Mr. Sullivan: I will now continue with the reading of Mr. Smith's deposition.

"Q. Mr. Smith, I will ask you to read the entry which you have just pointed out, adding no words of your own, but merely giving the columnar heading first and the entry as it appears opposite the picture of the Stork Club.

"A. 'Production No.: 4507. Code Title: Stork. Stars: Hutton, Fitzgerald. Current Week: February 15, 1947. Number of shipments: 32. Net dollar rentals: \$540.50. Dollar credits: \$35. Accumulated to February 15, 1947. Number of shipments: 14,457. Net dollar rentals: \$3,018,676.26. Weeks old, based upon national release date: 59.'

"Q. In your response to the last question, Mr. Smith, [171] under the word 'Code Title,' you mentioned and read 'Stork.' Does that identify the picture The Stork Club?

"A. That was the abbreviated title for Stork Club, yes, sir.

"Q. Does this record and this entry which you have just read here into the record, does that indicate the number of exhibitions that have been made throughout the United States?

"A. Yes, sir.

(Deposition of George A. Smith.)

“Q. What is that number, again?”

“A. 14,457.

“Q. You mentioned a little while ago that these nation-wide sheets on exhibit are accumulated to date. A. Yes.

“Q. Does that record show with respect to the picture The Stork Club the number of weeks that have elapsed since its release and for which this accumulation obtains? A. 59 weeks.”

Mr. Picard: If your Honor please, I object to this evidence as immaterial, irrelevant and incompetent, and that it refers to matters which have occurred since the filing of the complaint.

Mr. Sullivan: If your Honor please, from reading the cases on unfair competition, here is my understanding, that the plaintiff claiming infringement of unfair trade practice can show the continuance of the practice even after the suit has been filed.

The Court: I will allow it.

Mr. Sullivan (reading):

“Mr. Sullivan: So that the record may be clear, let the record show that in asking the witness, George A. Smith, to read into evidence the entries with respect to The Stork Club picture from the document from which he has been testifying, that the plaintiff in this case offers the entries into evidence on behalf of the plaintiff.

“Mr. Keith: Wait a minute. That will be objected to on the ground no sufficient foundation has been laid.

(Deposition of George A. Smith.)

“Mr. Sullivan: Q. Mr. Smith, have you here present in the room where this deposition is being taken, a document to which you have heretofore referred in your testimony which has to do with record of the exhibitions of the motion picture *The Stork Club* in the San Francisco area?”

“A. Yes, sir.

“Q. Which record is that, Mr. Smith?”

“A. This sheet.

“Q. So that this sheet may be designated, will you read the caption at the top of the sheet, please?”

“A. ‘Current Week Ending February 22, 1947.’”

“Q. I notice that there is a caption at the bottom of the sheet, Mr. Smith. Will you read that, please?”

“A. ‘San Francisco Exchange Picture Report.’”

“Q. Is this document which you have here present and which is before you one of the records of the Paramount Pictures, Incorporated?”

“A. Yes, sir.

“Q. Is this record made in the regular and ordinary course of business of Paramount Pictures, Incorporated? A. Yes, sir.

“Q. Has it been a part of the regular course of business of the Paramount Pictures, Incorporated, to make records such as that which you have indicated and which is before you at the time that the information is obtained, or within a reasonable time thereafter?”

“A. It is prepared each week for the previous week’s business.

“Q. Mr. Smith, does the record which is before

(Deposition of George A. Smith.)

you show any information with respect to the exhibition of the motion picture *The Stork Club*?

“A. Yes, sir.

“Q. Will you point it out?

“A. In the 60 weeks accumulated since the release of the picture, to February 22, 1947.

“Q. Let me interrupt you. You have just read from the document in the upper right-hand corner.

“A. Yes, sir.

“Q. That reads: ‘60 weeks accumulated to February 22, [174] 1947,’ is that correct?

“A. Yes, sir.

“Q. There are certain columns underneath that, are there not? A. Yes, sir.

“Q. The columns are labeled, are they?

“A. Yes, sir.

“Q. Would you please read from this document the columnar heading and the entries with respect to the motion picture, *The Stork Club*?

“A. The first column is, ‘Circuit or Zone,’ and under that column the names of the important circuit accounts are listed. In the second column, the heading is, ‘Number of Shipments,’ with sub-heading, ‘Screenings and other.’ The third column ‘Total net dollar film rental billings.’ The next column, ‘Dollar bill adjustments.’ The next column, ‘Checking costs,’ with two sub-headings, ‘No. of days checked,’ and ‘Dollar cost.’ And the next column is, ‘Co-op,’ meaning cooperative advertising.

“Q. Mr. Smith, I will ask you to examine this document with the end in view of ascertaining

(Deposition of George A. Smith.)

whether there are any entries for the distribution of the picture called The Stork Club.

“A. Yes, there are.

“Q. Will you read those entries, first reading the title of the column under which they appear, and then reading the [175] entries.

“A. Under ‘Number of shipments: 532.’ Under ‘Total net dollar film rental billings: \$126,588.89.’ Under ‘Dollar billing adjustments: \$57.50.’ Under checking costs: No. of days checked 33; Cost: \$339.81.’ Under ‘Co-op Advertising,’ one engagement, the dollar amount was \$316.56.

“Q. Is there an entry on this document for the number of exhibitions of the picture The Stork Club?

“A. The one I have already read, 532.

“Q. 532? A. Yes, sir.

“Q. Does that mean there were 532 showings in this area? A. Yes, sir.

“Q. What area would that be, from your knowledge of the——

“A. (Interrupting): Northern California. The border line—the dividing line from Southern California, being just north of Bakersfield, extending to the northern border of California, and overlapping into a very small part of Southern Oregon, Medford, and Ashland, and Lakeview, I think, are the only towns, and a few towns in Western Nevada.

“Mr. Sullivan: So that the record will be clear on the introduction of this evidence from the document which the witness has just testified with re-

(Deposition of George A. Smith.)

spect to, plaintiff offers in evidence the entries which Mr. Smith has just read into evidence, by reading from this document which is here present in the [176] deposition room.

“Mr. Keith: To which objection is made on the ground no sufficient foundation has been laid for the admission into evidence of any of the entries testified to by this witness.

“Mr. Sullivan: Q. Have you another document here present which you will refer to?

“A. Yes, sir, the final sales classification sheet.

“Q. The words, ‘Final Sales Classification Sheet,’ appear at the top of this document?

“A. Yes, sir.

“Q. Underneath I note the words, ‘Group A-5, Season 1945-46.’ A. Yes, sir.

“Q. What does that mean?

“A. That means that this sales classification covers all of the motion pictures that we released during our 1945-46 season.

“Q. Is that group designation called ‘Group A-5’ the same designation as appeared on the document which you have referred to in connection with the nation-wide distribution? A. Yes, sir.

“Q. Group A-5. Mr. Smith, is this a record of the Paramount Pictures, Incorporated?

“A. Yes, sir.

“Q. Is it made in the regular and ordinary course of business at the Paramount Pictures, Incorporated?

“A. Yes, sir.

(Deposition of George A. Smith.)

“Q. Is it part of the regular and ordinary course of [177] business of Paramount Pictures, Incorporated, to make records such as this at the time that the information is obtained which appears on the record, or within a reasonable time thereafter?

“A. Yes, sir.

“Q. Do you find on this record any reference made to the picture called The Stork Club?

“A. Yes, sir.

“Q. Before I ask you to read the entries which appear on this document, Mr. Smith, will you state what is the general purpose of this record in your corporation?

“A. As pictures are scheduled for release, the sales executives determine a sales policy under which they are to be sold—it is really licensed to the motion picture theatres throughout the United States. That sales classification is listed on the sheet and is sent to the thirty-one branches as their guide as to the proper times under which each individual picture is to be sold.

“Q. How do you break down the type of picture with respect to the breakdown that appears on this sheet?

“A. We have one, two, three, four, five, six, seven sales classifications.

“Q. What are they designated?

“A. Schedule AA, Schedule A, Schedule B, C, D, E, and F.

“Q. Do those sales classifications refer to any

(Deposition of George A. Smith.)

standard of excellence or quality with respect to the motion pictures [178] appearing therein?

“A. Yes, sir, that is the basis of the schedule.

“Q. That schedule AA is the top standard, according to your determination? A. Yes, sir.

“Q. You said you find an entry there for The Stork Club. A. Yes, sir.

“Q. In what category or schedule do you find The Stork Club? A. Schedule A.

Q. Will you read into evidence the entries which appear for The Stork Club, reading in each instance the columnar designation and immediately after the entries for The Stork Club as you go along.

“A. ‘Policy: Schedule A. Production No. 4507. Title: Stork Club. Running Time: 98 minutes. Block or Unit: 2. Release date: December 28, 1945.’

“Mr. Sullivan: So that the record will be clear, the plaintiff offers the entries which Mr. Smith has just read into evidence from a document before him here present in the deposition room as evidence on behalf of the plaintiff.

“Mr. Keith: To which objection is made, no sufficient foundation has been laid for the admission of such matters into evidence.

“Mr. Sullivan: Q. Mr. Smith, is The Stork Club, the [179] motion picture called The Stork Club, still being exhibited?

“A. To a very limited extent.

“Q. As I understood from your testimony, it has gone through approximately 59—

(Deposition of George A. Smith.)

“A. (Interrupting): It is now the 60th week. This week is the 60th week.

“Q. In the course of your experience in handling the sales distribution and release of that picture, did you experience any difficulty with respect to its sales or its booking?

“A. We always have some difficulties when we try to get the proper times, particularly for good pictures. Probably less than usual in this case.

“Q. Speaking from your experience and your knowledge of the sales distribution of Paramount Pictures, was there any particular reason why there was less difficulty in this case?

“A. Yes, there were three reasons. First, it was a very good motion picture; second, it had a very salable title, the popularity of the Stork Club was spread all over the United States. It was a very significant name; and, third, it had a good cast.

“Mr. Keith: I move that the answer of the witness be stricken out on the ground that it is his opinion and conclusion.”

Mr. Picard: I renew the objection, it is purely an opinion. [180]

Mr. Sullivan: We resist the motion on the ground that he is giving the results of his sales experience, and the testimony is offered for these two reasons, first of all, as showing the salability and high standard of excellence of this particular picture, and secondly, the evidence is offered to show that from his experience with the distribution of films—this witness having already testified that he

(Deposition of George A. Smith.)

was employed by Paramount for twenty-five years, he was in a position to give his opinion as sales executive as to the quality of the picture.

The Court: In what way does that go to the merits of the issues here involved?

Mr. Sullivan: This is offered to show, as the clippings of the various magazines were offered to show, the widespread reputation and fame of the Stork Club.

The Court: For that limited purpose I will allow it.

Mr. Sullivan (reading):

“Mr. Sullivan: Q. Mr. Smith, you have been associated with Paramount, I think you told me, for about 25 years. A. Yes, sir.

“Q. During that period of time have you had occasion to handle the sales and distribution of many motion pictures?

“A. Yes, I have personally handled the majority of the most important accounts in my division.

“Q. Can you estimate the number of motion pictures you [181] have handled during your experience with Paramount, or approximate them in some way?

“A. My estimate would be over a twenty-five year period, our yearly releases have averaged approximately 40 pictures. That would be approximately 1000 pictures.

“Q. In the course of the distribution of those pictures, have you been able to acquire from your experience an opinion as to the relative merits and

(Deposition of George A. Smith.)

to the reasons for either the slowness or the speed in moving these pictures into retail channels?

“A. I believe I have. That is what I am hired for.

“Q. A short time ago in your testimony when you gave an opinion as to the merits of The Stork Club and the manner in which its bookings were conducted, were you speaking from your years of experience in this field?

“A. Not only that, but my personal experience in negotiating the sale of this particular picture with a very great number of important accounts.

“Q. In the course of negotiating these sales, what, if any, experience did you have with reference to the popularity of the name ‘Stork Club’?

“A. I found that the picture, because of the three elements that I mentioned, was very favorably received by our customers.

“Mr. Keith: I will object to that on the ground it is [182] hearsay.”

Mr. Picard: I make that motion at this time, the answer should be stricken as hearsay.

Mr. Sullivan: We resist the motion, and in response to counsel’s motion indicate that the reason for offering the testimony is the same reason that I have heretofore indicated to your Honor.

The Court: I will allow it to stand. It goes to the weight of the testimony.

Mr. Sullivan (reading):

“Mr. Sullivan: Q. When you say you found out that it was very favorably received, were those

(Deposition of George A. Smith.)

reactions which you personally received from people with whom you talked? A. Yes.

“Mr. Keith: I will make the same objection to that, and move that the answer be stricken out.”

Mr. Picard: I object to that question as it calls for hearsay.

The Court: It is clearly hearsay.

Mr. Sullivan (reading):

“Q. Mr. Smith, you came to San Francisco on this last trip when?

“A. The night before last—Wednesday night.

“Q. That would be February 19th?

“A. Wednesday night. [183]

“Q. This is Friday, the 21st. A. Yes, sir.

“Q. When are you leaving San Francisco?

“A. Leaving tonight.

“Q. At what time? A. 8:45.

“Q. Where are you going?

“A. Los Angeles.

“Q. Do you expect to be in Los Angeles for any period of time?

“A. I will leave on Wednesday of next week for Kansas City, and I was called into New York this morning for a meeting on March 7th.

“Q. Do you expect to be, or will you be, in the San Francisco Bay Area on March 4, 1947?

“A. No, sir.

“Mr. Sullivan: No further questions.

“Mr. Keith: No questions.”

Now, in connection with the last page of this, Mr. Picard, without burdening the Court with it,

is it a fair statement of the record that it was stipulated that the records which were referred to by the witness Mr. George Smith could be identified as Exhibit A to C, and a photostatic copy substituted in place of the original and the original returned to the witness?

Mr. Picard: That is correct. [184]

Mr. Sullivan: I have here, Mr. Picard, photostatic duplicates of Plaintiff's Exhibits A, B and C for identification which are attached to the original, and both copies, yours and mine, of the deposition, and may I offer them without detaching the ones attached to the deposition?

Mr. Picard: Yes.

Mr. Sullivan: I offer in evidence Plaintiff's Exhibit A for identification, and ask that it be duly admitted and marked.

The Court: It may be admitted.

(Document designated National Picture Report, United States only, for 1945-46, is marked Plaintiff's Exhibit 65.)

Mr. Sullivan: I next offer Plaintiff's Exhibit B for identification and ask that it be admitted and duly marked.

The Court: It may be admitted and marked.

(Document designated Current Week Ending February 22, 1947, and in the righthand corner the notation, Sixty Weeks accumulated to February 22, 1947, is marked Plaintiff's Exhibit 66.)

Mr. Sullivan: Plaintiff offers Exhibit C for identification as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Document designated Final Sales Classification Sheet, Group A-5, Season 1945-46 is marked Plaintiff's Exhibit 67.)

Mr. Sullivan: May the record show that I am referring to A, B and C, and I am using the same designations that appear on the deposition of Mr. Smith. [185]

The Court: We will take a recess for a few minutes.

(Recess.)

Mr. Sullivan: The plaintiff will call Raymond L. Sullivan.

RAYMOND L. SULLIVAN

called in behalf of the plaintiff, sworn.

The Witness: If your Honor please, my name is Raymond L. Sullivan. My address is 261 San Fernando Way, San Francisco. I am an attorney at law, a member of the firm of Malone & Sullivan, and our office is at 819 Mills Building, San Francisco, and they were so during the year of 1945. I am one of the attorneys for the plaintiff, Stork Restaurant, Inc.

Mr. Clerk, may I ask you to mark this document which I have given you at this time, dated May 4,

(Testimony of Raymond L. Sullivan.)

1945, as Plaintiff's Exhibit for identification next in order.

The Clerk: Marked Plaintiff's Exhibit 68 for identification.

The Witness: And the letter of May 15, 1945, as plaintiff's exhibit next in order, being 69 for identification.

The Clerk: 69 for identification.

Mr. Sullivan: If your Honor please, I have here before me and I identify Plaintiff's Exhibit 68 for identification as being a letter dated May 4, 1945, addressed to the Stork Club, 200 Hyde Street, San Francisco, California. I recognize this as the carbon copy of an original letter. I took this carbon copy from my file. I dictated on May 4, 1945, the original of that [186] letter to my secretary who is Miss Gilligan. I then received the original and carbon back from Miss Gilligan and I signed the original letter and instructed Miss Gilligan to mail it and to take the carbon copy which I have here and which is Plaintiff's Exhibit 68 for identification and place it in our file. I know that this carbon copy, Plaintiff's Exhibit 68 for identification, is a true and correct copy of the original which I signed, and at this time, if your Honor please, I will show this Plaintiff's Exhibit 68 for identification to Mr. Picard (showing).

Mr. Sullivan: Plaintiff offers Plaintiff's Exhibit 68 for identification in evidence, if your Honor please.

Mr. Picard: To which we object, if your Honor

(Testimony of Raymond L. Sullivan.)

please, on the ground that it has not been shown that any of the defendants in this case were actually in possession of the premises designated as the Stork Club, 200 Hyde Street, San Francisco, California, on the date that that letter was mailed or would have been received.

Mr. Sullivan: We will endeavor to connect that up.

The Court: With the understanding it is connected up, I will allow it.

(The letter dated May 4, 1945, addressed to the Stork Club, 200 Hyde Street, San Francisco, is marked Plaintiff's Exhibit 68.)

The Witness: If your Honor please, I am now looking at and I identify Plaintiff's Exhibit 69 for identification, which is [187] a carbon copy of a letter dated May 15, 1945, addressed to the Stork Club, 200 Hyde Street, San Francisco, California, attention N. Zahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara and A. E. Syufy, partners. I took this carbon copy from my files. I dictated the original of which this is a carbon copy to my secretary, Miss Gilligan, and after it was dictated asked Miss Gilligan to return the original letter and this carbon copy to me, and I signed the original. I then gave Miss Gilligan the original with instructions to mail it and the carbon copy with instructions to place it in our file, and I know that this carbon copy, which is Plaintiff's Exhibit 69 for identification is a true and correct copy of

(Testimony of Raymond L. Sullivan.)

the original letter which I signed. I will show this now to Mr. Picard, or did I show you this already, Mr. Picard?

Mr. Picard: Yes.

Mr. Sullivan: I have heretofore given Mr. Picard copies of both of these letters. Plaintiff offers Plaintiff's Exhibit 69 for identification in evidence, if your Honor please, and asks that it be admitted and marked.

The Court: It may be admitted and marked.

(Letter of May 15, 1945, addressed to Stork Club is marked Plaintiff's Exhibit 69.)

Mr. Sullivan: That is all the direct testimony I have, your Honor.

Mr. Picard: No questions [188]

Mr. Sullivan: Plaintiff will call Teresa Gilligan.

TERESA GILLIGAN

called for the Plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Teresa Gilligan.

Q. (By Mr. Sullivan): Where do you live?

A. 795 Pine Street.

Q. Your occupation is what?

A. Housewife at present.

The Clerk: In April or May of 1945 were you employed?

(Testimony of Teresa Gilligan.)

A. Yes, I was employed by Malone & Sullivan, as secretary for Mr. Sullivan.

Q. And you were some time before that, were you not? A. Yes.

Q. And for several months after May, 1945?

A. That is right.

Q. Now I will show you Plaintiff's Exhibit No. 68 in evidence, which is a letter addressed to the Stork Club, 200 Hyde Street, dated May 4, 1945, and ask you if you can identify that. This is a carbon copy? A. Yes.

Q. Can you identify that?

A. Yes, I can identify it by my initials. I know that I wrote it because of that. [189]

Q. And you had a practice, did you not, at that time of identifying the correspondence by initials on our correspondence at the bottom?

A. That is correct.

Q. And RLS, what does that mean?

A. R. L. Sullivan.

Q. Does that indicate I dictated the letter?

A. Yes.

Q. And the "G" stands for what?

A. Gilligan.

The Court: Where is the original?

Mr. Sullivan: I am going to show we mailed it.

The Court: Mailed it to whom?

Mr. Sullivan: Mailed it to the addressee.

The Court: Who is the addressee?

A. 200 Hyde Street, San Francisco, California.

The Court: You will have to account for the

(Testimony of Teresa Gilligan.)

original before the copy is introduced in evidence.

Mr. Sullivan: Your Honor is correct. We argued the motion for a preliminary injunction and at that time I think that Mr. Picard took the position that his clients never received any of these letters.

Mr. Picard: I have been advised by my clients that they never received either of these letters. I believe there was considerable delay in their obtaining a license for the premises [190] and the former owner remained in possession until the license was granted, and it was granted some time after May 15, 1945, and my clients have never seen these letters until Mr. Sullivan furnished me with copies, I think at or about the time of the argument for a motion for a preliminary injunction.

The Court: I will allow them subject to being connected up.

Mr. Sullivan: Does your Honor mean as to the date?

The Court: As to the letter and its contents.

Mr. Sullivan: Do I understand, then, in view of Mr. Picard's statement that it is unnecessary for me to make a formal statement of the evidence?

The Court: If there is any question about it at all, he is entitled to the best evidence, and if his clients did not receive it, they are not bound by anything they did not receive.

Mr. Sullivan: I am relying on it and offering the testimony in order to establish the dictation

(Testimony of Teresa Gilligan.)

and mailing of the originals and the presumption thus far is that it has been received.

Mr. Picard: If your Honor please, I do not think that presumption would prevail in this case. I do not think counsel comes within the presumption of law. The presumption of law, as I understand it, is that a letter regularly addressed to a person is received in due course of the mail, but when it is addressed to the Stork Club and none of the defendants in this [191] case were in the Stork Club at that time, I do not think there is any presumption arises that any of these defendants received that letter.

Mr. Sullivan: We will connect it up, because, as your Honor can see, that is how we got hold of the names of these defendants, and that is how we indicated them on the letter of May 15, 1945. They were of record as being the owners at that time.

The Court: I will allow the testimony subject to a motion to strike and overrule the objection and unless it is connected up it will go out.

Q. (By Mr. Sullivan): With respect to Plaintiff's Exhibit 68 in evidence, was that prepared by you? A. Yes, it was.

Q. Who dictated that to you?

A. Mr. Sullivan.

Q. I did? A. Yes.

Q. At the time that you typed this up, did you type an original? A. Yes, I did.

Q. And is this carbon copy a true and correct copy of the original? A. Yes.

(Testimony of Teresa Gilligan.)

Q. After you typed these letters out, did you then give them to [192] me? A. I did.

Q. And did I sign them? A. You did.

Q. And did I give them to you? A. Yes.

Q. What did you do with them?

A. I put them in an envelope marked Malone & Sullivan, the regular stationery, and stamped them with a three-cent stamp and mailed them.

Q. When you say, "the envelope was marked Malone & Sullivan," you mean that is the return address? A. Yes.

Q. Which is printed or engraved on the envelope? A. Yes.

Q. Did you address the envelope to the Stork Club? A. The same as in the letter.

Q. Did you put a stamp on that envelope?

A. I did.

Q. Then did you mail that envelope?

A. I did.

Q. Did you mail it in a United States mailbox?

A. Yes, in the Mills Building.

Q. And with respect to Plaintiff's Exhibit 69, did you prepare this letter and also an original with it? [193] A. I did.

Q. I had better show you these letters. Do you identify this letter by the initials in the lower left-hand corner? A. Yes.

Q. The "RLS" indicates that I dictated the letter to you? A. That is right.

Q. And "G" stands for Gilligan?

A. That is right.

(Testimony of Teresa Gilligan.)

Q. After this had been dictated to you and typed by you, did you give it to me? A. I did.

Q. Did I sign it? A. Yes.

Q. Did I give it back to you?

A. Yes.

Q. What did you do with it then?

A. I folded it in an envelope, stamped it, mailed it.

Q. When I mentioned about your giving it to me and my giving it to you, we are talking about the original, are we? A. Yes.

Q. Then after you had addressed the envelope—did you incidentally, address it to the same address that appears on the letterhead here?

A. That's right.

Q. After you did that, did you stamp the envelope? [194] A. Yes, I did.

Q. Then mail it? A. Yes.

Q. In a United States mailbox?

A. Yes, in the Mills Building.

Mr. Sullivan: No further questions.

Mr. Picard: No questions.

Mr. Sullivan: Plaintiff will call the defendant N. Sahati pursuant to rule 43(b) of the Rules for Civil Procedure.

NICHOLAS M. SAHATI

called for the Plaintiff, was sworn.

The Clerk: Will you state your name to the Court?

A. Nicholas Michael Sahati.

(Testimony of Nicholas M. Sahati)

Direct Examination

By Mr. Sullivan:

Q. Where do you live?

A. 3770 Fillmore Street, at the present time.

Q. You are one of the defendants in this case, are you not?

A. Yes.

Q. What is your occupation?

A. Well, my main occupation is food packing—I am in the food packing business.

Q. The defendant, Zafer Sahati, you know her, do you not?

A. Yes.

Q. She is your mother, I believe.

A. Yes. [195]

Q. And she lives in San Francisco, does she?

A. Yes.

Q. And Sally Sahati is your sister?

A. That is right.

Q. And she lives in San Francisco?

A. That is correct.

Q. And Edmond Sahati is your brother?

A. That is correct.

Q. He lives in San Francisco?

A. That is correct.

Q. And Alfred Ansara is your brother-in-law?

A. That is correct.

Q. And he lives in San Francisco?

A. That is right.

Q. And A. E. Syufy is your uncle?

A. Right.

Q. And he lives in San Francisco?

A. That is right.

(Testimony of Nicholas M. Sahati)

Q. Now, Mr. Sahati, in the early part of 1945, you and the other defendants, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara, A. E. Syufy, formed a co-partnership, did you not, with respect to the business at 200 Hyde Street?

A. That is right.

Q. And you took over that business as a co-partnership on what date? [196]

A. Well, around March 15, I think the actual papers were drawn up in the transaction, but we actually did not take possession and install our manager until probably sixty days later, because of the State Board of Equalization regulations concerning the transfer of a license.

Q. Well, Mr. Sahati, is it a fact you and the other defendants filed an application with the State Board of Equalization for a liquor license or for a transfer of the liquor license on March 14, 1945?

A. That is correct.

Q. Isn't it a fact that this liquor license was issued to all of you on April 6, 1945?

A. It might have been issued, that is, the transfer of the record might have been effected at that date, but we did not take possession, as I explained to you, until the license actually came through; until that time we were not, according to law, allowed to put in our own manager and operate under our own payroll. The place at that time was still under the management of Bill Bush and his associate.

Q. But irrespective of when you, according to testimony, took possession, it is a fact, is it not,

(Testimony of Nicholas M. Sahati.)

that you were issued a liquor license on April 6, 1945?

A. If the record shows that, but we of course had to acquire through the Bank of America escrow, which we did not entirely consummate on the date that you mention. [197]

Q. Well, at any rate, you were connected with this establishment at 200 Hyde Street on April 6, 1945?

A. That is correct as to actual ownership, but not actual possession—do I make myself clear?

Q. Well, as a matter of fact, you received part of the profits for that period?

A. We did in this respect, the agreement made with Bush and his associates embraced a proportionate accounting of profits from March 15 or thereabouts on, on the basis that we agreed on a percentage basis, to which we both agreed, of the total receipts. Those figures were taken from statements furnished by them while still in the active handling of the business.

Q. Now, this partnership of you and the other five defendants continued throughout most of the year 1945, isn't that correct?

A. That is correct.

Q. And would it be fair to state that somewhere in the latter part of 1945 you and Mr. Ansara withdrew from the partnership, at least of record?

A. That is right.

Q. And the other four defendants then entered

(Testimony of Nicholas M. Sahati.)

into a co-partnership with respect to these premises?

A. That is right.

Q. And they have continued as such down to date?

A. That is right.

Q. But as a matter of fact, you have been the guiding spirit [198] ever since March 14, 1945, have you not?

A. That is correct.

Q. In other words, you are the boss?

A. I would not say that I am the active manager. I am the active manager of a number of business enterprises that we run, hotels and apartment houses and bowling alleys and the like of that; and a small restaurant at Lake Tahoe.

Q. The place at Lake Tahoe has to do with entertainment?

A. Yes.

Q. You have also had other liquor establishments in San Francisco?

A. Yes, we have.

Q. As a matter of fact, even though the record is different with respect to the holding of the liquor license in the premises at 200 Hyde Street, you are still financially interested in it?

A. None whatsoever, neither of record or hidden, as you might call it.

Q. Do you get any compensation for acting as manager?

A. None at all except at various times whether it be my sister or my mother or someone else, they have had surplus funds which I have seen fit to place for them; as a matter of fact, they don't know whether they were interested in a bar or restaurant, neither my sister, my mother nor my uncle, any of

(Testimony of Nicholas M. Sahati.)

them; it so happens that I am entrusted with their funds, and as I said, at [199] various times I have placed them.

Q. But you have complete authority to act for them?
A. I have complete authority.

Q. And so far as the particular premises at 200 Hyde Street are concerned, you have had the same amount of authority after your withdrawal from this partnership as you had before?

A. Only in the capacity of manager which I still retain at this time, and which I had at that time.

Q. Now, when you took over the business at 200 Hyde Street from Mr. Bush, you also assumed the name of the Stork Club, did you not?

A. I do not quite understand that question.

Q. All right, I will put it this way: When you and your five partners began to operate the Stork Club on Hyde Street, at 200 Hyde Street, you operated it under the name of the Stork Club, didn't you?
A. That is correct.

Q. And when you took over this business it was a going business, was it not?

A. That is correct.

Q. And you just assumed the name Stork Club when you took this over, did you?

A. I bought the business as it was known, as the Stork Club.

Q. But you did not buy the name?

A. I don't think any specific mention was made of the name; we [200] bought the business, as I recall, and it was embodied in the bill of sale as the

(Testimony of Nicholas M. Sahati.)

premises at 200 Hyde Street, known as the Stork Club; having had no previous experience to amount to anything in the way of buying places of this nature, it was just assumed that we bought the business, the name and everything else.

Q. Aside from that, it is a fact that you did not buy the name, isn't that correct?

A. That I would not swear to, but we bought the business known as the Stork Club. Now the name alone at that time was not brought up. The same applies to our purchase of a place called The Topper Club.

Mr. Sullivan: We object to this as volunteer and not responsive.

The Court: He may finish the answer.

A. The same applies to the way we bought the Topper Club, where we bought the business with the name of The Topper Club. The bill of sale embodied the premises known as The Topper Club. So to that extent the assumption is that we bought the Stork Club and also the right to use the name at the time from Bill Bush.

Q. Mr. Sahati, do you remember the deposition which was taken of you in my office on February 18, 1945?

A. I do.

Q. I will show you the deposition and show you particularly [201] Page 12, and I will ask you to read from line 15 down to line 22 and then after you have done that I will ask you——

A. Yes, I remember that.

Q. I will ask you, Mr. Sahati, if at the time and

(Testimony of Nicholas M. Sahati.)

place of the taking of this deposition I did not ask you the following questions to which you gave the following answers:

“Q. When you purchased the business at 200 Hyde Street from Mr. Bush, did you take an assignment of the name which is called the ‘Stork Club’ and appears in your premises?”

“A. No, sir.

“Q. You just merely kept that on there?”

“A. That is right.

“Q. He didn’t sell you the name?”

“A. No.”

Did you give those answers at that time?

A. Yes, I did, but the way I understood the question was, Was there a specific line of demarcation between the premises and the name, and my answer was made accordingly. In other words, as I just explained previously, the bill of sale embodied the purchase of the Stork Club premises at 200 Hyde Street known as the Stork Club. There was no definite line of demarcation by the actual name Stork Club from the Stork Club as the premises; that is what the essence of my understanding was and the answer to your question at that time.

Q. But aside from your understanding, Mr. Sahati, it is true, [202] is it not, as you stated there, that you did not get an assignment of the name itself?

Mr. Picard: I will object to that on the ground

(Testimony of Nicholas M. Sahati.)

that the bill of sale itself is the best evidence of its contents.

The Court: If the bill of sale is available, that is the best evidence.

Mr. Sullivan: Mr. Sahati, after you people went into the operation of the Stork Club, of course you used the name "Stork Club" in connection with various state and national agencies? A. We did.

Q. For instance, when your co-partnership filed income tax return, you filed it under the name of Stork Club? A. Yes.

Q. When you filed your California income tax return for your co-partnership, you filed it under the name of Stork Club? A. Yes, we did.

Q. That practice has been continued from the former partnership and new partnership down to date? A. Correct.

Q. And you also listed the Stork Club in the telephone book, did you not?

A. Yes. Let me modify that. I would not say we made a new listing; we carried on with the old listing from the time Bill Bush and his associates owned the place; there was no change in telephone number, and no change of listing. [203]

Q. Well, you kept the listing in the book for the Stork Club? A. As it was before.

Q. I have here, Mr. Sahati, a San Francisco telephone directory for November 1946, and I will direct your attention to Page 507, and in particular on the second column of this page, "Stork Club,"

PLAINTIFF'S EXHIBIT No. 71

[Endorsed]: U. S. D. C. N. D. Cal. No. 25707.
Plaintiff's Exhibit No. 71. Filed 4/2/47. C. W.
Calbreath, clerk. By J. P. Welsh, deputy clerk.

PLAINTIFF'S EXHIBIT No. 70

[Endorsed]: U. S. D. C. N. D. Cal. No. 25707.
Plaintiff's Exhibit No. 70. Filed 4/2/47. C. W.
Calbreath, clerk. By J. P. Welsh, deputy clerk.

(Testimony of Nicholas M. Sahati.)

Mr. Sullivan: Q. Now, do you have any signs on the [204] exterior of the premises that mention the name Stork Club?

A. Yes, on the marquee is a sign that has been there for the last seven years—five years probably before we purchased it.

Q. You mean since 1940?

A. I think so. Since thereabouts it has been there.

Q. How do you place that date?

A. Well, the former owners went in there about that date, I understand.

Q. 1940? A. Around that date.

Q. Do you know of your own knowledge?

A. I couldn't say that I do.

Q. Did you ever see that sign there in 1940?

A. No, I did not. I was not in San Francisco then and had no interest in any nightclub at the time.

Q. You were not in San Francisco in 1940?

A. No.

Q. Were you in San Francisco in 1941?

A. Yes, I think so.

Q. Did you see that sign there in 1941?

A. I couldn't say as to that because I was not interested in nightclubs, but I understand the former owners operated under that name for a good many years prior to the time we purchased the business.

Mr. Sullivan: If your Honor please, the plain-

(Testimony of Nicholas M. Sahati.)

tiff moves [205] to strike the testimony of the witness as to what he understands.

The Court: It may go out.

Mr. Sullivan: That is his understanding, the former owners operated under that name for a good many years prior to the time they purchased the business.

The Court: It may go out.

Mr. Sullivan: Q. Now that sign is on the marquee, you say, on the outside of these premises?

A. Yes.

Q. It has been there continuously since you people purchased the premises from Mr. Bush?

A. That is correct.

Q. And it is there now? That's right.

Q. Since the first day that you purchased the premises and owned them, did you have any insignia about the premises consisting of a stork standing on one leg or any kind of stork insignia?

A. There was on the glass panel of the front door the insignia of the stork but no monocle and no top hat.

Q. Was it standing on one leg?

A. I could not tell you, Mr. Sullivan, I don't recall.

Q. After the institution of this action you had this removed, didn't you? [206]

A. I did. The first time it was brought to my knowledge I had it removed.

Q. Did you ever use the insignia in any other way on the premises?

(Testimony of Nicholas M. Sahati.)

A. There might have been a few leftover napkins that the former owners had in the place when we took over, with the picture of a stork, which we used up, but never did order any napkins of that type.

Q. And how many napkins did you take over?

A. I couldn't say exactly, maybe a few dozen.

Q. A few dozen? A. Yes.

Q. Isn't it correct that there was a large quantity of napkins there and you continued to distribute them until almost the time this action was commenced?

A. There might have been a larger quantity; I have no method of knowing, I could not tell you exactly how many there were; in other words, we used up whatever surplus or excess supply there was.

Q. Whatever there was, you used them up?

A. That is correct.

Q. Mr. Sahati, I will show you Plaintiff's Exhibit 72 for identification and ask you if that is one of the napkins which was distributed at your place of business.

A. I could not tell you, I never seen it before, but I do know [207] there were some napkins in the place when we took over.

Q. Have you ever been in the place at 200 Hyde Street?

A. I have been in there about five times in the two years, merely to change managers.

(Testimony of Nicholas M. Sahati.)

Q. You have never seen any napkins in the place at all?

A. I have never seen these napkins specifically.

Q. Not this napkin, but one like it?

A. No.

Q. You have never seen any napkins?

A. I have seen napkins, but I have not seen that napkin depicting the stork insignia.

Q. Take a look at Plaintiff's Exhibit 72 for identification. I call attention to the fact that it says, "Stork Club, Corner Turk and Hyde Streets." Is that your establishment?

A. That is right.

Q. "Graystone 9764," is that your telephone number? A. That's right.

Q. You do not deny that this came from your establishment?

A. I can neither deny it nor affirm it; it is in the same situation as many things that we took over when we took over the premises; I could not tell because I would not know what they were.

Q. Weren't you the manager of this establishment?

A. No, I was not. I am the overall manager; each place has a manager in it; I am the overall manager, of the entire [208] organization.

Q. As overall manager, do you have under your supervision the activities of your various places?

A. I do not think it is very material in this case. I do not think it is very material in the case of the napkins for my time to be devoted to single items

(Testimony of Nicholas M. Sahati.)

like this, that the managers themselves usually take care of in the routine line of business.

Q. Mr. Sahati, I did not ask you that question. I asked you this question, Don't you as overall manager of your family enterprises have supervision over the operation of the various places of business?

A. That's right.

Mr. Sullivan: I offer this napkin, marked Plaintiff's Exhibit 72 for identification, in evidence, if Your Honor please.

The Court: It may be admitted and marked.

(The napkin marked Plaintiff's Exhibit 72 for identification is received in evidence as Plaintiff's Exhibit 72.)

San Francisco

FINEST LIQUORS • EXPERTLY BLENDED ENTERTAINMENT



U. S. DIST. CT. N. D. CAL.

No. 25707

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EX. No.

BY

4-2-47
G. W. CALDWELL, CLERK

py
[Signature]

(Testimony of Nicholas M. Sahati.)

Mr. Sullivan: Q. You told us about the insignia on the door, Mr. Sahati. Is there any other place upon which the insignia of the stork appeared?

A. I can not recall, Mr. Sullivan; the glass panel on the door is the only place where I can recall that insignia appearing. [209]

Q. Have you been in the place recently?

A. Well, I have not been in there for approximately three months; I very seldom go in there; I never have had occasion to go in unless I had to make a change of managers.

Q. Well, now, Mr. Sahati, you have advertised in magazines in San Francisco, haven't you?

A. No.

Q. Haven't you ever given any ads to magazines?

A. We did give a couple of newspaper ads, very infrequently, probably in some special publications like the City Hall Digest; in your question as to whether I advertised it in magazines, I assume that you mean magazines of a wide circulation; the magazines we have placed ads in have been purely complimentary, like the American Legion; and there are some magazines we have given complimentary ads sometimes, but not advertising in the sense that I assume you are questioning me about, of a widespread nature.

Q. At any rate, you have advertised in magazines, whatever may be their circulation.

A. That's right.

(Testimony of Nicholas M. Sahati.)

Q. When you advertised it, you advertised it as the Stork Club, didn't you?

A. That is right.

Q. On occasions you use an insignia, do you not?

A. Not an insignia. [210]

Q. You never use the insignia?

A. No, no.

Q. Did you ever advertise in any other way?

A. Nothing except typewritten ads at very infrequent intervals as I mentioned.

Q. On how many occasions since March, 1945?

A. No more than five or six complimentary ads.

Q. That is all? A. Yes.

Q. You have never had any cards distributed or given out?

A. Never—never printed a card.

Q. Who is Johnny Cappula? Does he work for you? A. He did.

Q. As I understand it, he was your manager under you as overall manager, is that correct?

A. Well, I supervise all the activities of the family, as I told you; specifically I did not manage this place, but I supervised the entire activities and placed the managers; that is the way our operations are conducted.

Q. And Johnny Capula had complete charge of the premises at 200 Hyde Street? A. Yes.

Q. Mr. Sahati, I will show you Plaintiff's Exhibit 73 for identification, a card which says, "Johnny Capula presents Wilbur Stump playing

(Testimony of Nicholas M. Sahati.)

piano nitely, The Stork Club, Hyde and [211] Turk." Have you ever seen that card before?

A. I never saw that card before; I knew Walter Stump was there.

Q. He was there?

A. Yes, Walter Stump was there. I didn't know that he put out cards like that.

Q. You know this is your place, don't you?

A. I will tell you, if I had known he put out that card, he would have been fired immediately.

Mr. Sullivan: I will offer in evidence this card marked Plaintiff's Exhibit 73 for identification, and ask that it be duly admitted and marked.

The Court: It may be admitted and marked.

(Card marked Plaintiff's Exhibit 73.)

Johnnie Coppula

presents

WILBUR STUMP

playing piano nitely

★ STORK CLUB ★

HYDE AND TURK

U. S. DIST CT N. D. CAL.

No. 25707

PLP

EX. No.

73

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4-2-47

C. W. CALBREATH CLERK

BY

J. P. Wilson

(Testimony of Nicholas M. Sahati.)

Q. (By Mr. Sullivan): Now, did you ever have any other kind of advertising or advertising material? A. Never.

Q. Now, Mr. Sahati, I will show you a match pad which is marked Plaintiff's Exhibit 74 for identification and reads, "Phone Graystone 9764, The Stork Club, 200 Hyde Street, San Francisco," and ask you if you ever saw that before or any replica of this.

A. Well, the name on here is Sahati. I will tell you something about these——

Q. I would like an answer. [212]

A. I will give you an answer if I can explain.

Q. Will you please answer the question, Have you seen it? A. I have not seen it.

Q. Or anything like it?

A. No, I have not.

Mr. Picard: Now, you can explain your answer.

A. Now I can explain this. The company who furnished these match books takes standing orders, and they are way behind in their deliveries, and when the new owner came in, they probably came to the manager and told him, because we had taken over several deposits——

Mr. Sullivan: I will move to strike this testimony as being just a conclusion and opinion of the witness.

The Court: You don't know that of your own knowledge?

A. I do; if you will let me explain I will tell you. The same thing happened, Mr. Sullivan, too, in the

(Testimony of Nicholas M. Sahati.)

case of the Topper Club. We had a deposit with a match company—we did not place the deposit originally, the former owner placed the deposit, and then we were given credit for it, so they came up to the manager and asked him who the new owner was, because the place still had a credit, and so the manager gave the name as Sahati. I have never seen this before. That is the only explanation for the name on there.

Q. (By Mr. Sullivan): Now, Mr. Sahati, these match pads in countless numbers were distributed at your place? [213]

A. I would not say countless, I would say the balance of the order that had probably gone to the former ownership, which we took over, which we did on all deposits made on merchandise. Now the manager probably was approached by the salesman and told that he had a credit coming from this company and asked who the new owner was; thereupon receiving the name, the manager probably observed the name or told them to put the name of Sahati on there.

Mr. Sullivan: I move to strike all of that testimony.

The Court: Let the probable portion go out.

Q. (By Mr. Sullivan): You know that match pads with the name of the Stork Club and your name on it were being distributed at the Stork Club, 200 Hyde Street?

A. I did not.

Q. Didn't you ever go in there to supervise the distribution of various things?

(Testimony of Nicholas M. Sahati.)

A. No, as I told you before, I did not supervise the activities.

The Court: He said he was in there five times in two years.

Mr. Sullivan: Plaintiff offers this match pad which has been marked Plaintiff's Exhibit 74 for identification in evidence and asks that it be duly admitted and marked.

The Court: It may be admitted and marked.

(The match book is marked Plaintiff's Exhibit 74.) [214]

U. S. DIST. CT. N. D. CAL.

No. 25707

Pyp

EX. No.

74

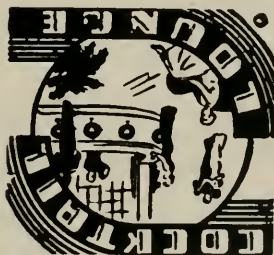
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4-2-47

C. W. CALBREATH, Clerk

J. M. [Signature]

SAN FRANCISCO, CALIF.



Phone
Graystone 9764

THE STORK CLUB

200 Hyde Street
SAN FRANCISCO

SAHATI, Prop.

CLOSE COVER BEFORE STRIKING

(Testimony of Nicholas M. Sahati.)

The Court: We will take an adjournment now until tomorrow morning at 10:00 o'clock.

(An adjournment was taken until tomorrow, Thursday, April 3, 1947.) [215]

Thursday, April 3, 1947—10:00 A.M.

The Clerk: Stork Restaurant v. Sahati.

NICHOLAS SAHATI

recalled.

Direct Examination

(Resumed)

By Mr. Sullivan:

Q. Mr. Sahati, you made some mention yesterday about the telephone that is now listed at the premises which you operate at 200 Hyde Street. I don't know whether I asked you this question, but I will at this time, that has been a continuous listing, has it, since you people took over the premises? A. Yes.

Q. And you have paid the bills, have you?

A. Yes.

Q. Who signs the checks? A. I do.

Q. You sign the checks for any of the activities around the place?

A. Exactly what do you mean by activities?

Q. You sign the checks for the purchase of liquor? A. Yes.

Q. You sign the checks for alterations about the premises?

(Testimony of Nicholas Sahati.)

A. Alterations are usually paid out of petty cash funds which the manager has in his possession.

Q. Well, you just did over your sign in front of the premises, [216] didn't you? A. Yes.

Q. You knew that? A. Yes.

Q. There was a bill for that, was there not?

A. Painting you mean?

Q. Yes. A. Yes.

Q. You did not pay that out of petty cash, did you?

A. No, that is paid by the owners of the building.

Q. The owners of the building—So you did not pay that? A. No.

Q. But for any extensive supplies for the premises that would be paid by check signed by yourself? A. Correct.

Q. How do you sign those checks? Do you sign Stork Club?

A. The check is made out Stork Club and my signature appears on it.

Q. All of your bills are paid the same way with the exception of the small bills out of petty cash, is that correct? A. Yes.

Q. I asked you yesterday about the use of the insignia, Mr. Sahati, and I believe that you told me that with the exception of the door, where you had the insignia originally on the front door, the insignia of the stork, and with the possible [217] exception of the napkins, you did not use that insignia at any time in any other way, is that correct?

A. That is correct.

Q. You told me something yesterday about advertising this place, and I want to ask at this time if you have ever advertised the Stork Club at 200 Hyde Street in any other way than you told me yesterday.

A. Not that I recall.

Q. Did you ever advertise it as a place of entertainment?

A. Well, at one time we had the pianist, and when we took over from the previous ownership there was a three-piece orchestra that they had on their payroll for probably two years, which continued with us for about a month after we took over, and at that time there was no advertising in the papers or magazines or in any periodical; it was simply there; I think there was a little panel placed over the marquee saying "Entertainment" or words to that effect.

Q. When you say "little panel," was it the size of the whole marquee?

A. It probably was, but that has long since been removed.

Q. When?

A. I think it was about three months ago when they had a pianist in there, and when the pianist was discontinued the panel was taken down.

Q. Three months ago would be around January.

A. I could not give you the exact date, Mr. Sullivan, but in that approximate period.

Q. Well, that would be a fair statement, wouldn't it, January, 1947?

A. Well, I would not want to say; it might have been three months, it might have been four months.

(Testimony of Nicholas Sahati.)

I would have to look my records over if I were to give you a definite statement on it.

Q. When had that panel been placed there?

A. I couldn't tell you, I would say a year and a half or two years ago.

Q. That would be around 1945?

A. Not that particular panel,—maybe another panel. In those days they frequently tore down things, the boys got a little hilarious and would rip down the panel, so it might have been a new panel entirely.

Q. Did you ever see anybody pulling that panel down? A. Did I?

Q. Yes.

A. That has happened quite frequently.

Q. Did you ever see them pulling it down?

A. Yes.

Q. You saw people pulling the panel down?

A. Yes.

Q. When was the occasion you mentioned about two years ago [219] that they had that panel? Would you say that would be around 1945?

A. I would imagine so; I think it was pulled down on V-J Day.

Q. That would be August of 1945?

A. I think so.

Q. Mr. Sahati, I will show you Plaintiff's Exhibit 75 for identification, which purports to be a photograph of your establishment at Turk and Hyde

(Testimony of Nicholas Sahati.)

Streets and ask you if that is an accurate and fair reproduction of the establishment.

A. Correct.

Q. I will call your attention to a panel which is all along the marquee, and says "Entertainment."

A. I just told you that.

Q. This was the panel you say somebody pulled down.

A. No.

Q. That is not the panel?

A. I think in answer to your question whether it was the same panel, I said it might have been a different panel; this one I mentioned here, I told you I could not place the exact date.

Q. The panel two years ago was in the same position, was it not?

A. I could not tell you that.

Q. You don't know whether it was in this position or along the wall?

A. If I remember correctly, the panel was on one front here, [220] it did not cover the entire marquee.

Q. You actually saw people pull it down?

A. It happened in our three places on that day.

Q. Now, I will show you Plaintiff's Exhibit 76 for identification which purports to be another view of your place of entertainment.

A. That is the same panel.

Q. That is the same panel? A. Yes.

Q. And does that panel extend from the other side of the marquee which is not shown in Plaintiff's Exhibit 75 for identification, is that correct?

A. That is right; it extends all the way around.

(Testimony of Nicholas Sahati.)

Q. These pictures, you will notice, were taken on December 5, 1946.

A. I have no way of remembering the particular panel that was up there.

Q. I call your attention to Plaintiff's Exhibit 76 for identification; that is a fair and accurate reproduction of your place of business?

A. Yes, exactly.

Q. And would you say that both of these pictures were fair and accurate reproductions of your place of business on December 6, 1946?

A. Yes, I would say so, these are both 1946 pictures. [221]

Mr. Sullivan: I offer Plaintiff's Exhibit 75 and 76 for identification in evidence, if your Honor please, and ask that they be duly admitted and marked.

The Court: They may be admitted and marked.

(The photographs were marked Plaintiff's Exhibits 75 and 76.)



U.S. DIST. CT. N. D. CAL.
No. 25707

PLP. 75
4-7-47

...
J. M. ...

(Testimony of Nicholas Sahati.)

Q. (By Mr. Sullivan): Mr. Sahati, at the time you and the five other people you mentioned as partners first purchased the place of business at Turk and Hyde Streets, you personally yourself knew of the existence of the New York Stork Club, didn't you?

A. I had heard of it; I had no idea of what it embraced or was like.

Q. You had known of the use of the name Stork Club by the Stork Club of New York for some time, hadn't you? A. I would not say that.

Q. How long before March 14, 1945, had you?

A. I can answer that: I was not much interested in establishments of night clubs to that extent, and I did not visit those places; had no interest in them.

Q. Approximately how long before March 14, 1945, two years, three years, five years, ten years?

A. I could not tell you that. As a matter of fact, I can say I gave it very little attention, probably never heard of it, as far as that goes. [222]

Q. There is no question that you knew about it before you purchased the place, isn't that correct?

A. Well, I had heard about the Stork Club of New York; how extensive an affair it was I had not given any thought to.

Q. I will show you Plaintiff's Exhibit 68 in evidence which purports to be a letter that I wrote to the Stork Club on May 4 of 1945. Have you the original of that letter? A. No.

Q. Did you receive the original of that letter?

A. No.

(Testimony of Nicholas Sahati.)

Q. On May 4, 1945, 200 Hyde Street was the legal business address of the business that you and your associates were conducting there, wasn't it?

A. The legal business address of our business was 410 Loew Building, San Francisco.

Q. Mr. Sahati, was 200 Hyde Street the business address of the Stork Club as conducted by the co-partnership constituted and comprised of you and the five other people have mentioned?

A. Yes.

Q. I will show you this letter of May 15, 1945, which is Plaintiff's Exhibit 69 in evidence, addressed to the Stork Club at 200 Hyde Street, San Francisco, attention N. Sahati and other people, and ask you if you received the original of that letter.

A. No, I did not receive the original of this letter dated [223] May 15.

Q. Was 200 Hyde Street the business address on May 15, 1945, or thereabouts of the co-partnership composed of the people you mentioned?

A. That is right.

Mr. Sullivan: No further questions.

Cross-Examination

By Mr. Picard:

Q. Mr. Sahati, were you and your associates— I will refer to the other members of the family as your associates—were you and your associates in possession of the premises known as the Stork Club on May 4, 1945?

(Testimony of Nicholas Sahati.)

Mr. Sullivan: Objected to as immaterial, irrelevant and incompetent, if your Honor please; they owned the place and had given it that business address. Whether they were there or not that day, certainly it does not affect the matter.

Mr. Picard: I do not think counsel's remarks are apropos of the situation. If your Honor is at all familiar with the manner in which these liquor licenses are transferred, at that time, particularly the State Board of Equalization of California was very strict as to anyone taking possession until the license was actually delivered to the new licensee. The old licensee was required to remain in possession—it sometimes took as long as three or four months for the license to be delivered; they examined all of the books for the sales tax; they made various investigations; they issued the license and [224] they retained it and some time elapsed before delivery. The legal title might have been transferred during the intervening period by the delivery of the bill of sale.

Mr. Picard: What is the date of this letter?

Mr. Picard: May 4 was the first one. Then there was one of May 15.

The Court: If he was not there on the premises you are entitled to make that showing.

Mr. Sullivan: If he was not there?

The Court: Yes, for the reason that there is a question about whether that was delivered to him. Am I in error?

Mr. Sullivan: I would not say your Honor is

(Testimony of Nicholas Sahati.)

in error, but the point is this: Every indication here is these people gave a legal address of 200 Hyde Street. How in the world could you make demand upon these people otherwise?

The Court: Assuming that to be true. Suppose it was mailed and delivered to the premises and they were not there. They say they did not get it. They have got to show that. I will allow the question.

Mr. Picard: Will you read the question, please?

(Question read.)

Q. Were you and your associates in possession of the premises known as the Stork Club at 200 Hyde Street, San Francisco, on May 15, 1945?

A. No, sir. [225]

Q. Now, Mr. Sahati, will you please describe the size and general appearance of the premises known as the Stork Club at 200 Hyde Street?

A. The tavern at 200 Hyde Street known as the Stork Club would be, I would say, about 15 feet on Turk Street, and I would say maybe 40 feet on Hyde Street.

Q. What would be the interior?

A. About one-fifth of that space was occupied by restrooms for both the ladies and men. One-fifth, about that space, I would say, was used for store-rooms for liquors, and the other three-fifths contains a bar and about ten stools.

Q. (By the Court): Who is the owner of the building? A. The Bank of America.

(Testimony of Nicholas Sahati.)

Q. What size is that lot—that must be about 20 feet.

A. No, I would say it is 15 feet on Turk Street.

Q. Does the Bank own the adjoining property?

A. I think they do.

Q. What I am trying to find out is what vara lot that it is; that would give the size of the premises.

Mr. Picard: Not necessarily, because this building might not take up the entire lot.

The Court: All right. Proceed. All I had in mind was the size of these premises.

Mr. Picard: It looks to me a little over 15 feet.

A. I do not think you will find it more than 15 feet. [226]

Q. (By Mr. Sullivan): Have you measured it?

A. No.

Q. Are you just guessing?

A. I know from the panes of glass there, there are two panes of glass and they run about six feet in width, and I think it is about three feet from the end of the window to the corner.

Q. It is all of six feet, there are two windows?

A. Probably 15 or 17 feet, I do not think it would be any more.

Mr. Picard: I would say it would not exceed 20 feet. We won't have any difficulty in finding out. We can measure it.

The Court: Proceed with the case.

Mr. Picard: I do not think it makes a great deal

(Testimony of Nicholas Sabati.)

of difference anyway. It is a small place; that is what I am trying to show.

Q. You say there is a bar there with about ten stools?

A. That is correct.

Q. Are there any tables?

A. There are a few tables there.

Q. During the period from the commencement of this action which I believe was on February 25, 1946, to the present time, has there been any change in the interior of the premises?

A. Not at all.

Q. Has there been any change during that period in what has been served in the premises? [227]

A. Not at all, nothing.

Q. Will you tell me during that period of time, what has been served since February 25, 1946, when this action was commenced?

A. The only change then was that previously the Board of Equalization had not clamped down on the rule of serving food in bars, which they have done recently for some unknown reason, and up to that time, in order to comply with the law, we kept a few kinds of food on hand if the customers demanded it, and if the customer insisted on anything to eat more than that we could always go out and buy a meal and bring it in, but I do not think we ever had occasion to buy a meal for a customer and bring it into the place in the two-year period.

Mr. Sullivan: I move to strike all of this as a conclusion and opinion of the witness, especially in

(Testimony of Nicholas Sahati.)

view of his testimony he had only been in the premises five times during this period.

The Witness: I did get reports daily and weekly.

Mr. Sullivan: In any event, it is hearsay.

The Court: It will go out.

Mr. Picard: Just tell us what you know yourself.

A. I do know that they have never had occasion to or been asked to serve a meal.

Mr. Sullivan: I will object to the testimony and I move to strike out that answer. It is obviously hearsay. I submit that the witness should be made to testify to the five specific [228] occasions he said he was in these premises.

The Witness: If you will give me a chance to explain——

Mr. Picard: Don't argue with Mr. Sullivan. He is talking to the Court.

Mr. Sullivan: May the answer go out?

The Court: Yes.

Mr. Picard: I want you to testify on matters within your own knowledge, obtained by personal observation of the premises. What has been served in the Stork Club since you and your associates took possession of it?

Mr. Sullivan: I will object to that question both as to form and as to the answer for which it calls.

The Court: If he knows, he may answer. Tell us of your own knowledge.

A. No heavy meal has been served in the Stork

(Testimony of Nicholas Sahati.)

Club since we took possession. Had such a meal been served——

Mr. Picard: Don't go into that.

A. No meal has been served since we took possession.

Q. What has been served there?

A. A few slices of cold meat, that we are able to keep on hand, in order to simply conform with the law regulating the operation of bars.

Q. Has any liquor been served there?

A. Yes.

Q. What type of liquor? [229]

A. Various types, blends and straight whisky, Scotch, etc.

Q. Have you seen any menu that has been there?

A. Not at all.

Q. Have there been any menus there?

A. No.

Q. Any wine list?

A. The only list was when the OPA required the posting of prices of wine and liquor; there was no wine list that was attached to a menu.

Q. Has the place been conducted along the lines of what are commonly known as taverns or bars?

Mr. Sullivan: I will object to that as calling for a conclusion of the witness.

The Court: I think we are going into minute details which have no place in the case.

Q. (By Mr. Picard): Mr. Sahati, what type of entertainment was put on at the place at the time it had entertainment there?

(Testimony of Nicholas Sahati.)

A. The only entertainment that was put on at the place when we took over, when we purchased from the previous owner, Bill Bush, was they had an orchestra, and they continued with them for about a month, and I would say at two or three intervals in the succeeding two years of our possession, we employed a pianist for a few days at a time; when we found it was not very profitable, we let it go. That pianist may have been a girl or a man. [230]

Q. Has there been any dancing at any time in the premises?

A. None whatsoever at any time.

Q. How many employees have you been employing in the Stork Club since you and your associates have operated it?

A. There is a manager, and there is one bartender—there are two bartenders, a bar maid, a waitress at times, she is not always there, no steady employment for her straight through, maybe three days a week, or a week when exceptionally busy; the manager may put her on a week; I would say there is about four steady employees.

The Court: We will take a recess.

(Recess.)

Mr. Picard: At the premises known as the Stork Club at 200 Hyde Street, San Francisco, is there any dance floor? A. No.

Q. Is there any dancing permitted in the premises? A. No, sir.

(Testimony of Nicholas Sahati.)

Q. If the place were filled with as many people as it could hold, how many people could get into it?

A. If it was jammed full, there would be about 50 people could get in it.

Mr. Picard: That is all.

Mr. Sullivan: I have no further questions.

HAVILOCK FOURNESS

called as a witness for the plaintiff, sworn.

The Clerk: Will you state your name to the Court? A. Havilock Fourness.

Direct Examination

By Mr. Sullivan:

Q. Mr. Fourness, you are employed by whom?

A. The City and County of San Francisco.

Q. Are you in the Recorder's office of the City and County of San Francisco? A. Yes.

Q. I have subpoenaed the Recorder's office to bring here certain official records. Have you brought those records? A. Yes.

Q. And are the records which you have here the official records of the City and County of San Francisco? A. Yes.

Q. Is it part of the regular course of business of the Recorder's office of the City and County of San Francisco to keep in volumes such as you have there

(Testimony of Havilock Fourness.)

as official records, the records of various documents which are placed of record? A. Yes.

Q. Are those various documents when they are placed of record kept in volumes in your office in the regular course of business? A. Yes.

Q. And this volume which you have here is official records, is [232] it? A. Yes.

Q. Now, would you mind turning to—what volume is that, Mr. Fourness? A. 4,215.

Q. Would you turn to Page—I believe I gave you the page number—Page 476? A. Yes.

Q. Do you find on Page 476 of Volume 4,215 of the official records of the Recorder of the City and County of San Francisco a notice of intended transfer by one W. N. Bush with respect to the premises at 200 Hyde Street? You can answer that yes or no. A. Yes.

Q. Would you please read from the official record what you see there with respect to that intended transfer?

A. “Notice of Intended Transfer by W. N. Bush. Notice is hereby given that W. N. Bush of 200 Hyde Street, San Francisco, California, intends to transfer to Zafer Sahati, A. E. Syufy, Edmund Sahati, Sally Sahati, A. Ansara and M. Sahati of 200 Hyde Street, San Francisco, California, an on-sale beer and wine license and an onsale distilled spirits license, which were issued to 200 Hyde Street. There is no consideration involved in this transfer. The transfer will take place on the premises on March 14, 1945. W. N. Bush, transferee.

(Testimony of Havilock Fourness.)

Recorded at the request of vendee [233] March 7, 1945, at 2:05 p.m. T 45673, fee \$1.00, folio 3, in said book of compared documents. Backstedt."

Mr. Sullivan: That is all.

Mr. Picard: No questions.

THOMAS O'CONNOR

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court? A. Thomas O'Connor.

Direct Examination

By Mr. Sullivan:

Q. Where do you live, Mr. O'Connor?

A. 1439 Schrader Street.

Q. You are an attorney at law?

A. That is right.

Q. You are associated with the law firm of Malone & Sullivan? A. Yes.

Q. The office address is 849 Mills Building, San Francisco? A. That is right.

Q. Mr. O'Connor, at my request did you in September of 1946 visit the premises of the establishment called the Stork Club at 200 Hyde Street, San Francisco? A. I did.

Q. I will show you Plaintiff's Exhibit 74 in evidence, which is a match pad, and ask you if you have seen that before. A. Yes, I have. [234]

Q. Where did you get that?

(Testimony of Thomas O'Connor.)

A. I got that at the premises of the Stork Club at 200 Hyde Street.

Q. Can you tell us briefly the circumstances under which you got that?

A. I stood at the bar and the matches were on the bar and I picked one up and took it out.

Q. You had a drink at the same time, didn't you? A. Yes.

Q. I mean, you did not take it without giving some consideration? A. No.

Q. You did not have to pay for the matches?

A. No.

Q. Mr. O'Connor, did you at my request make an examination of the interior of the premises on that occasion? A. Yes, I did.

Q. Did you at my request make an examination of the interior to ascertain if there were any insignia consisting of a stork or some similar object in the interior of the premises? A. Yes.

Q. Did you see any?

A. Yes, there were two stork insignia on the premises, the first as you came in the door was on the carpet, and this was a stork standing on one leg with a cane under its wing, with a [235] top hat and cocktail glass; this was woven into the carpet; it was an insignia about, I should judge, two feet in length and two feet in depth.

The other stork insignia was on the juke box of the premises, and that was a stork that was painted on the glass of the juke box, and the stork was

(Testimony of Thomas O'Connor.)

standing on one leg with a top hat, and in its bill was a diaper, and in the diaper was seated a young lady.

Mr. Sullivan: That is all.

Cross-Examination

By Mr. Picard:

Q. Now, Mr. O'Connor, with respect to the stork that you say was woven in the carpet, was that on the floor?

A. That is right; it was woven in the carpet on the floor at the entrance to the premises.

Q. And the other one was on the juke box?

A. On the front of the juke box, the glass cover, above the part where you put in the money.

Mr. Picard: That is all.

Mr. Sullivan: That is all.

GEORGE CAVANAUGH

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court? A. George Cavanaugh.

Direct Examination

By Mr. Sullivan:

Q. By whom are you employed?

A. State Board of Equalization, Liquor Control Division.

Q. Have you been subpoenaed to bring certain

(Testimony of George Cavanaugh.)

records pertaining to the liquor license and application therefor for the premises at 200 Hyde Street in San Francisco? A. Yes.

Q. You have brought those here, have you?

A. Yes.

Q. And are those records which you have brought here contained in the folder you have in the witness chair? A. Yes.

Q. And are the records which you have brought the official records of the State Board of Equalization of California?

A. Of the Liquor Control Division, yes.

Q. Of the Liquor Control Division of the State Board of Equalization? A. Yes.

Q. Are they records made in the ordinary and regular course of business by the Liquor Control Division? A. They are.

Q. And is it part of the regular and ordinary course of business of the Liquor Control Division to make such records? A. It is.

Q. And from your knowledge of those records and the various entries therein made at the time the transaction indicated [237] occurred or within a reasonable time in the record?

A. That is correct.

Q. Do you find an application for a liquor license for the premises at 200 Hyde Street made by N. Sahati with other people? A. Yes, there is.

Q. May I see it, please? A. Yes.

Mr. Sullivan: I will show it to counsel, if your

(Testimony of George Cavanaugh.)

Honor please, because I am going to have the witness read this part of it into evidence.

Q. Mr. Cavanaugh, you have shown me and I have exhibited to counsel and he has examined it, an application for transfer, entitled "Application for Transfer of Alcoholic Beverage License," addressed to the State Board of Equalization, Alcoholic Beverage Control Division, 1020 N Street, Sacramento, Calif. By whom is that application signed?

A. N. Sahati, Zafer Sahati, A. E. Syufy, Albert Ansara, Edmond Sahati, Sally Sahati.

Q. What was the date, Mr. Cavanaugh, on which this application was filed?

A. The date of the application, which is the same date as the date of notarization, is March 14, 1945.

Q. And do your records disclose the license was issued pursuant to that application? [238]

A. It does.

Q. What date was the license issued?

A. At that time there were two licenses applied for, an onsale beer and wine license and an onsale distilled spirits license. The first one, onsale beer and wine license, was dated April 6, 1945, and the second, distilled spirits license, bears the date of issuance April 6, 1945.

Q. Mr. Cavanaugh, do you find in your file with respect to the premises at 200 Hyde Street, an application made by a prior holder of licenses, one W. N. Bush, which bears the name Stork Club?

A. Yes, there is an application for an onsale

(Testimony of George Cavanaugh.)

distilled spirits license and onsale beer and wine license dated March 1, 1943, in the name of William N. Bush. The name under which the business was to be conducted is Stork Club. Location of the premises, 200 Hyde Street, San Francisco, San Francisco County.

Q. And was there a license issued pursuant to that?

A. Yes, an onsale beer and wine license dated March 25, 1943, and on sale distilled spirits license dated March 25, 1943, in favor of William N. Bush, DBA Stork Club, 200 Hyde Street, San Francisco; each of the licenses bears the same signature, W. N. Bush, DBA Stork Club, 200 Hyde Street, San Francisco.

Q. Mr. Cavanaugh, do you find an indication in your file for the premises at 200 Hyde Street of the name Stork Club prior to that date? [239]

A. No. The former license was to Pat Kelly, who conducted the business under the name of Elbow Room, 200 Hyde Street, San Francisco.

Mr. Sullivan: That is all.

Cross-Examination

By Mr. Picard:

Q. Mr. Cavanaugh, is there anything in your file to indicate the date when the name of the premises was changed from Elbow Room to Stork Club?

A. The only thing to indicate that would be the application that was made by William N. Bush. Previous to that time the place was operated by

(Testimony of George Cavanaugh.)

Pat Kelly who transferred it upon the 3rd of January, 1943, to William N. Bush, and that is the first time that we have the name Stork Club used.

Q. When did Pat Kelly obtain that license?

A. June 15, 1942.

Q. Now, referring to the license that was issued in the name of Sahati, et al., after that license was issued on April 6, what was done with it?

A. The date of the license is April 6. In the normal course of distribution of licenses, we would receive that license the next morning, and it would then be delivered, to the premises at 200 Hyde Street. The only exception to that would be if the 6th of April would be on a Friday, the license wouldn't be delivered until the following Monday; we would not pick up the mail probably until Monday, and if it came in Saturday, there [240] would not be a supervisor there to open it, and it would not be opened until Monday, so the delivery would not be until the following Monday. I do not know what day the 6th of April was; I mean if it was Friday, it would have been delivered the following Monday. Otherwise, it would be delivered the next day.

Q. Wasn't it sometimes delayed by reason of sales tax or other matters?

A. Not at that time. It is only within the last year that they have changed the system, so that they hold it until they get a release from the Sales Tax Division. That is within the last year.

Q. You are sure that is only within the last year?

(Testimony of George Cavanaugh.)

A. I am positive, because I know it was following the death of Dan Dwyer, who had the premises at 7th and Market, and after he died there was a loss of taxes that occurred in connection with that, and from then on we have to get a release of the Sales Tax Division before we distribute the licenses.

Mr. Picard: I think that is all.

Mr. Sullivan: That is all.

G. DECKER

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name for the Court? A. G. Decker. [241]

Direct Examination

By Mr. Sullivan:

Q. Mr. Decker, you are an employee of the State Board of Equalization of the State of California?

A. Yes, Beverage Sales Tax Division.

Q. Have you with you the official records of the State Board of Equalization of the State of California pertaining to the sales tax permit of the premises at 200 Hyde Street, San Francisco?

A. I have.

Q. Are those records kept and maintained in the regular and ordinary course of business?

A. Yes.

Q. And is it part of the regular and ordinary

(Testimony of G. Decker.)

course of business of the Sales Tax Division to keep those records? A. Yes.

Q. Do you have a record of the date upon which the sales tax permit was issued to N. Sahati and other people at the premises at 200 Hyde Street?

A. Yes.

Q. May I see that record? A. Yes.

The Court: What does the record disclose? Just state it.

A. The record discloses that the starting date of Sahati is 3/16/45.

Q. (By Mr. Sullivan): That would be March 16, 1945? [242] A. Yes.

Q. Do you have also with you your audit sheet pertaining to the account of Mr. Bush?

A. Yes.

Q. Does that disclose the last date for which Mr. Bush paid sales tax to the State of California?

A. Yes, 4/11/45.

Q. That is April 11, 1945? A. Yes.

Cross-Examination

By Mr. Picard:

Q. Now with reference to the sales tax permit which was issued on March 16, 1945, it is necessary before an application can be made for a transfer of a liquor license, that the applicant go to the Sales Tax Division of the State of California and obtain that sales tax permit and then take it with him in making an application for the transfer of a liquor license; is that correct? A. Yes.

(Testimony of G. Decker.)

Mr. Picard: That is all.

Mr. Sullivan: At this time, if your Honor please, plaintiff respectfully makes a motion that all evidence introduced by the plaintiff in this case, oral or documentary, of whatsoever nature, be applied in support of and in proof of the allegations of the first count of plaintiff's complaint and also all allegations of the second count of plaintiff's complaint. [243]

Mr. Picard: No objection, your Honor.

Mr. Sullivan: Plaintiff rests, your Honor.

Mr. Picard: Now, if your Honor please, at this time I move that all of the exhibits and evidence which were admitted over objection or in which the Court ruled that they would be admitted subject to a motion to strike, now be stricken from the record.

Mr. Sullivan: We resist the motion.

The Court: I will allow the evidence to stand and the motion will be denied.

Mr. Picard: At this time, if your Honor please, I move that the plaintiff be non-suited on the first and second counts of the complaint herein, upon the ground that it is obvious from the testimony here that there is neither any unfair competition or exclusive right to the name under the facts that have been shown here; that the distance of three thousand miles between the two places of business, that the different types of business, and the nature of them has been clearly brought out by the evidence produced by the plaintiff itself; I submit, if your

(Testimony of G. Decker.)

Honor please, that the plaintiff is not entitled to any relief.

Mr. Sullivan: We resist that motion, if your Honor please, and we are prepared to do anything that the Court desires with respect to the presentation of legal authorities. Mr. Picard has not made anything but the brief outline of his [244] action. We are prepared to argue it orally or submit it in briefs, whatever your Honor wishes.

The Court: Are you prepared to argue the matter now?

Mr. Picard: Yes.

Mr. Sullivan: Yes.

The Court: Proceed.

(Counsel thereupon argued the motion.)

The Court: I will reserve a ruling. You may put in your evidence this afternoon.

Mr. Picard: Very well.

(A recess was here taken until 2 p.m.) [245]

Afternoon Session

NICHOLAS M. SAHATI

recalled for defendants.

Direct Examination

By Mr. Picard:

Q. Mr. Sahati, there has been testimony here that there was a juke box in your place of business known as the Stork Club at 200 Hyde Street which

(Testimony of Nicholas M. Sahati.)

had a stork on it. Does that juke box belong to you and your associates? A. No.

Q. How did that juke box come there?

A. Well, this juke box was placed there by a music outfit that takes a percentage of what is taken in, and they probably brought it in.

Mr. Sullivan: I move to strike that.

The Court: They brought it in?

A. They brought it in; and the insignia of the stork appears on several other boxes that they have had in different parts of San Francisco. It was not any particular insignia that they placed on there because of the Stork Club.

Q. (By Mr. Picard): Did you order a juke box with a stork on it? A. No.

Q. It made no difference to you what insignia was on it? A. No.

Mr. Sullivan: If the Court please, I object to that as immaterial, irrelevant and incompetent.

The Court: It may not be material; the fact was that it [246] was on there.

Mr. Picard: That is all.

Cross-Examination

By Mr. Sullivan:

Q. Did you ever see a stork on any other juke box? A. I did not see them personally.

Mr. Sullivan: Then, if your Honor please, I move to strike all that evidence as being hearsy.

Mr. Picard: Not all of the testimony.

(Testimony of Nicholas M. Sahati.)

Mr. Sullivan: The testimony with respect to the existence of other juke boxes with storks on them.

The Court: It may go out.

Mr. Sullivan: No further questions.

Mr. Picard: The defendants rest.

Mr. Sullivan: The plaintiff rests.

The Court: You may now proceed with the argument.

Mr. Picard: Just a moment before counsel goes on. I think for the purpose of the record I will withdraw the motion for a non-suit in view of the fact that testimony has been offered by the defendant, and submit the matter so that there can be a decision on the case.

The Court: Is it submitted on both sides?

Mr. Picard: Yes.

Mr. Sullivan: Yes.

(Thereupon counsel argued the case.)

The Court: The injunction will have to be denied. [247]

CERTIFICATE OF REPORTER

I, E. W. Lehner, Official Reporter, certify that the foregoing 247 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

[Title of District Court and Cause.]

Monday, April 28, 1947

SETTLEMENT OF FINDINGS

Mr. Picard: Counsel has filed what is called amendments to findings but it is really a sort of an attempt to make a motion for a new trial by substituting findings and conclusion which are contrary to your Honor's decision.

Mr. Sullivan: I want to say that is not so; it was not intended to be such, and Mr. Picard has certainly ascertained by reading my findings that it could not have that appearance. Does your Honor want me to begin on this matter? I proposed the amendments.

The Court: I think the better thing to do is to take up the findings. What is it that you have in mind?

Mr. Sullivan: There are several things, if the Court please. You will remember that during the three days of trial the defendants' case consisted of about three minutes—I would say not in excess of five minutes—of testimony, counting the cross-examination, and most of that testimony upon my motion your Honor struck out, so that the actual evidence admitted by the Court with respect to the defendants' case would probably be down to one of the smallest minimum that has ever been done in this court, so that you have a situation where all of the evidence in the case has been produced by the plaintiff.

The Court: Counsel says there is not sufficient evidence to sustain your findings. You will have to explain that to justify your findings.

Mr. Picard: I think I have made a reasonably fair statement of the evidence in my findings.

The Court: I did not examine them myself. I depended on you.

Mr. Picard: I tried to do it.

(Thereupon counsel argued the findings.)

The Court: I am going to sign the findings.

Mr. Sullivan: May I for the purpose of the record: on behalf of the plaintiff may an exception be noted in the record to the signing of the defendants' proposed findings?

The Court: Yes.

CERTIFICATE OF REPORTER

I, E. W. Lehner, Official Reporter, certify that the foregoing 2 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

[Endorsed]: No. 11657. United States Circuit Court of Appeals for the Ninth Circuit. *Stork Restaurant, Inc.*, a corporation, Appellant, vs. *N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara, A. E. Syufy*, Appellees. Transcript of Record. Upon Appeal from the District Court

of the United States for the Northern District of California, Southern Division.

Filed June 17, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
in and for the Ninth Circuit

No. 11,657

STORK RESTAURANT, INC., a corporation,
Appellant,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SA-
HATI, EDMOND SAHATI, ALFRED AN-
SARA and A. E. SYUFY,

Appellees.

STIPULATION DISPENSING WITH
PRINTING OF ORIGINAL EXHIBITS

It Is Hereby Stipulated, by and between the parties hereto, that the original exhibits to be used on the consideration of this appeal, other than Plaintiff's Exhibits Nos. 70, 71, 72, 73, 74 and 75, need not be reproduced in the record herein; and

It Is Further Stipulated that all exhibits ad-

mitted in evidence in said action may be considered by the above entitled Court in their original form.

Dated: June 20, 1947.

MALONE & SULLIVAN,
/s/ WILLIAM M. MALONE,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Appellant.
/s/ ALBERT PICARD,
Attorney for Appellees.

It is so Ordered.

/s/ FRANCIS A. GARRECHT,
Judge of the above entitled
Court.

[Endorsed]: Filed June 21, 1947.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR THE CONSIDERA-
TION THEREOF

(Rule 19)

Comes now the appellant in the above-entitled appeal and presents and files its statement of the points on which it intends to rely on appeal, and designates the parts of the record which it things necessary for the consideration thereof, to-wit:

Statement of Points on Appeal

1. The trial court erred in failing to find and conclude that the appellant is the sole and exclusive

owner of, and solely and exclusively entitled to the use of the trade name "The Stork Club," and the trial court further erred in finding that appellant has no right to the trade name "The Stork Club" in the State of California.

2. The trial court erred in failing to find that appellant has expended considerable effort and large sums of money advertising and otherwise promoting its business and trade name by various methods and through various media, said expenditures not being limited to advertising in the State of New York, and the trial court further erred in finding that appellant's trade name "The Stork Club" has no value in the State of California.

3. The trial court erred in failing to find and conclude that the use by the appellees of the name "Stork Club" in the conduct and operation of their business, was wilful, wrongful and unlawful, in disregard of appellant's rights and without appellant's consent.

4. The trial court erred in failing to find that the use by appellees in the conduct and operation of their business of the name "Stork Club" and in conjunction therewith, insignia similar to appellant's insignia and consisting of a stork standing on one leg and wearing a high hat, was for the purpose of appropriating to themselves and benefiting by, the trade-name, good-will, fame, reputation and trade established by appellant.

5. The trial court erred in finding that appellees do not display or maintain any insignia similar to

appellant's insignia, and have not caused the name "Stork Club" or the related insignia to be used in their place of business or advertised or publicized to patrons, or profited from the same; and the trial court further erred in failing to find that appellees have used the name "Stork Club" in their financial and commercial transactions.

6. The trial court erred in finding that no confusion has arisen in the minds of the public or will arise or exist and none of the public will be deceived or misled into believing that appellee's business is connected or associated with, operated by or under the supervision of appellant, and the trial court further erred in failing to find that there is a reasonable liability and likelihood that such confusion and deception will arise and exist.

7. The trial court erred in finding that by reason of the acts of appellees in the conduct and operating of their business, including appellees' use of the name "Stork Club," no damage has been or will be caused to appellant's trade, business, trade-name, good-will, reputation or standing, or to the extension or development of appellant's patronage throughout the United States of America, or within the State of California, or the City and County of San Francisco, or at all.

8. The trial court erred in finding that appellant has not caused a demand to be made upon appellees to desist and discontinue their use of the trade-name "Stork Club" or the aforesaid related insignia.

9. The trial court erred in failing to find that appellees acquired no interest in the name "Stork Club" from their predecessor, W. N. Bush.

10. The trial court erred in finding and concluding that appellant has been guilty of laches.

11. The trial court erred in failing to conclude and hold that appellees' use of the name "Stork Club" and related insignia in the conduct and operation of their business constitutes an infringement upon, and invasion of, appellant's property rights therein.

12. The trial court erred in failing to conclude and hold that appellees' use of the name "Stork Club" and related insignia, in the conduct and operation of their business, constitutes an unfair trade practice.

13. The evidence does not support or sustain the findings of fact and conclusions of law, as aforesaid.

14. The trial court erred in allowing and admitting in evidence against appellant, and over the objection of appellant, testimony of the witness N. Sahati, one of the appellees, relating to the possession by appellees of their place of business on May 4, 1945, and May 15, 1945.

15. The trial court erred in holding and decreeing that appellant take nothing by this action as against defendants, or any of them, that an injunction be denied to appellant, and that appellees recover from appellant their costs and disbursements.

Designation of Parts of Record Deemed
Necessary for Consideration of Appeal

Appellant designates the complete record, proceedings, evidence and exhibits in the action (original exhibits to be used in consideration of this appeal without reproduction in the record).

The foregoing statement of points on appeal and designation of parts of the record which appellant deems necessary for the consideration of said appeal is respectfully presented and filed in compliance with Rule 19, subdivision 6, of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 19th, 1947.

MALONE & SULLIVAN,
/s/ WILLIAM M. MALONE,
/s/ RAYMOND L. SULLIVAN,
Attorneys for Appellant.

Receipt of a copy of the within Statement of Points on Appeal and Designation of Parts of Record Necessary for the Consideration Thereof is hereby admitted this 19th day of June, 1947.

/s/ ALBERT PICARD, S.M.
Attorney for Defendants.

[Endorsed]: Filed June 19, 1947.

No. 11,657

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

STORK RESTAURANT, INC. (a corporation),
Appellant,

VS.

N. SAHATI, ZAFER SAHATI, SALLY SAHATI,
EDMOND SAHATI, ALFRED ANSARA, A. E.
SYUFY,
Appellees.

BRIEF FOR APPELLANT.

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SYUFY,
Appellees.

BRIEF FOR APPELLANT.

ABSTRACT OF THE CASE.

The appellant, Stork Restaurant, Inc., brought this action in the District Court for the Northern District of California, Southern Division, to enjoin the appellees from infringing upon the appellant's property right in its trade name, "The Stork Club," and from engaging in unfair trade practices affecting such trade name and, also, the appellant's insignia, consisting of a stork standing on one leg and wearing a high hat and monocle.

The complaint (Tr. 2, 10) likewise sought damages in the sum of \$5,000, but this prayer was waived (Tr. 51, 53-54).

After a trial at which evidence, oral, documentary, and physical, was introduced, the court (Judge Roche) made findings of fact and conclusions of law (Tr. 37) and entered judgment (Tr. 45) denying injunctive relief. The court did not render an opinion.

The broad question on the appeal is whether the trial court erred in denying the injunction.

STATEMENT OF JURISDICTION.

The jurisdiction of the trial court was founded upon Section 24 of the Judicial Code (28 U. S. C. A., sec. 41 (1)). The complaint alleged that the appellant is a corporation organized and existing under the laws of the state of New York, and that the defendants are all residents and citizens of the state of California; and that the matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000 (Tr. 3). The trial court found that it had jurisdiction of the action, and the finding is supported by the record (Tr. 38, 3, 19).

The jurisdiction of this Court on appeal arises from Section 128 of the Judicial Code (28 U. S. C. A., sec. 225), which grants jurisdiction to review "final decisions" in the district courts. The judgment appealed from (Tr. 45) was made and entered April 28, 1947. The notice of appeal (Tr. 46) was filed with the Clerk of the District Court on May 16, 1947, which was within the time allowed by 28 U. S. C. A., sec. 230.

SUMMARY OF EVIDENCE.

The testimony introduced by the appellees on direct examination occupies about one page of the printed transcript (Tr. 284-285), and a portion of such testimony was later stricken (Tr. 286). In addition, the appellees introduced a very slight amount of testimony by way of cross-examination. The balance of the testimony, all of the documentary evidence except Defendants' Exhibits A and B, which consisted of a wine list and a menu of the appellant's "Stork Club" (Tr. 158-159), and all of the physical evidence¹, which was rather voluminous, were introduced by the appellant. As a result, there is no substantial conflict in the evidence.

For the sake of convenient reference, the following summary of the evidence will be presented under various topical headings which will later be keyed to the argument.

Nature and Extent of the Appellant's Business and Reputation.

The appellant owns and operates a cafe and night club in New York City which is known all over the world as "The Stork Club" (Tr. 63), and which has been described in a newsreel as "the best and most publicized night club in the entire world" (Tr. 150).

As found by the court, "The plaintiff now is, and continuously since on or about August 15, 1934, has been operating, maintaining and conducting a large

¹A considerable number of important documentary and physical exhibits are not contained in the printed transcript, but have been made a part of the record on appeal (Tr. 289).

restaurant, cafe and night club business under the name "The Stork Club" at No. 3 East 53rd St., New York City, New York, supplying therein and thereat expensive food, beverages, music and dancing facilities" (Tr. 38); "plaintiff employs approximately two hundred forty (240) people to provide several hundred customers each day between 11:30 A.M. and 4:00 P.M. with relatively high-priced and high quality food, beverages and entertainment, which service yields an average gross income of over one million (1,000,000) dollars" (Tr. 39).

Further, "The plaintiff has expended considerable effort and large sums of money, aggregating in excess of five hundred thousand (500,000) dollars in the last eleven years advertising in the State of New York" (Tr. 39). Specifically, the record shows that the appellant expended \$727,582. 59 during the years 1935 through 1945 for advertising purposes (Tr. 58); and, despite the court's finding that such sum was spent in advertising "in the State of New York", the record clearly shows that such advertising was conducted, through various media, including radio, newspapers, magazines, books, motion pictures, and established mailing lists, on a nation-wide scale. In order adequately to convey the force and breadth of the appellant's continuous advertising and promotional campaign, we shall now summarize under appropriate sub-headings the undisputed evidence in this regard.

Gifts, souvenirs, postal cards, and circulars. During the years 1937 through 1945 the appellant expended the following amounts: "260 clip watches, \$2640; 4878

key tags, \$802.43; 400 radios, \$4840; 15,700 calendars, \$2305.20; 3975 decks of playing cards, \$1012.99; 160 fountain pens, \$2153.50; 42 alligator bags, \$2612.29; 17,624 lipsticks, \$5827.80; 2108 compacts, \$4216; 86,000 paper cigarette holders, \$818.75; 221,500 'Stork Talk', \$6163.02; 658,350 postal cards, \$3051.80—that item does not comprise the entire amount. Also, 4503 ties and scarfs, \$22,256.01; 2716 auto plates, \$911.30; 22,229 bottles of perfume, \$102,549.54; 639,923 lucky coins, \$11,693.50; 6,983,750 packages of book matches, \$18,095.42; 26,608 articles of jewelry amounting to \$9,969.36" (Tr. 70-71). Numerous of these items are in evidence as physical exhibits. See Plaintiff's Exhibits 3 through 6, 7-A, 7-B, 8 through 11, 12-A, 12-B, 13, 14-A, 14-B, and 15 through 21.

The figures for the postal cards represent only one year, 1940; a minimum of 200,000 cards were purchased in each of the other years from 1937 through 1945 (Tr. 71). While a similar itemization is not available for the years 1935 and 1936, the appellant expended \$33,135.80 and \$47,482.87 in those years, respectively, for such advertising (Tr. 60-61).

The transcript is replete with evidence indicating the widespread distribution of such articles. For example, the match pads, postal cards and circulars, as well as other items, were distributed by way of a mailing list consisting of about 200,000 names (Tr. 120). This mailing list was compiled from various sources, including "the registers of various schools, clubs, private mailing list of the movie people on the west coast, Congressmen, Senators, and Mayors; also, of

social register of New York City and all over the United States” (Tr. 120). Included in the mailing list were the social registers from San Francisco itself (Tr. 120). Sample volumes of the San Francisco Social Register for the years 1935 and 1941, taken from the files of the San Francisco Public Library, were exhibited in court (Tr. 207-208). While the entire mailing list was not used for each item, “numerous of the items” mailed during the past ten years went to persons in the San Francisco area—a “majority” of the time (Tr. 138). “Many thousands” of articles were distributed through the mails in this manner for advertising purposes (Tr. 121). Many of the articles bore the insignia as well as the name of “The Stork Club” (Tr. 113-114). By special arrangement, some of the match pads were distributed by TWA from its airports all over the country (Tr. 88).

The Stork Club has given away automobiles, thousand dollar bills, five hundred dollar bottles of perfume, and thousands of thirty-five dollar bottles of perfume (Tr. 167). It sends Christmas presents to all United States Senators and Congressmen, Governors, and all Mayors of the largest cities (Tr. 168).

The balance of the \$727,582.59 was expended on so-called “house” advertising, covering such matters as complimentary meals and entertainment furnished to visiting celebrities, including “members of the newspaper field and radio celebrities and stars of stage and screen, men in prominent and public life in the industrial world” (Tr. 114); and photo supplies, salaries for advertising, and the like (Tr. 115).

Newspapers. During a sample two-month period, from March 4 to May 4, 1942, there were over a thousand clippings from newspapers, supplied by a clipping service, in which the Stork Club was mentioned (Tr. 108). And during a sample six-month period, from December, 1945, to July 9, 1946, the Stork Club was mentioned over a thousand times in connection with photographs taken exclusively at the club (Tr. 107). The newspapers in which such items appeared were published all over the United States, including practically every state in the union (Tr. 108).

The Stork Club's publicity director takes each year thousands of photographs—at least a thousand a month—of persons visiting the club. These pictures are in demand by photo syndicates in New York City and all movie magazines (Tr. 157). A large percentage of the pictures are republished in newspapers, magazines, and other publications, and invariably credit is given to the Stork Club—that is, all photographs bear the words "Stork Club" (Tr. 157-158). These publicity practices have been carried on over a long period of years (Tr. 158).

A group of 25 caption sheets, showing the names and addresses of persons from San Francisco and vicinity who had patronized the Stork Club and had been photographed there for newspaper publication, was introduced into evidence as Plaintiff's Exhibit 22 (Tr. 121-123). These sheets were not the entire amount, but were "just a few taken out of the files recently" (Tr. 121). Such photographs were sent to

the various wire services, such as Associated Press, Acme News, United Feature Syndication, and International News Photo, which in turn sent prints to all states in the union (Tr. 125). Four sample newspaper clippings taken from California newspapers in December, 1940, containing photographs of San Francisco people who attended the Stork Club, were introduced into evidence as Plaintiff's Exhibit 24 (Tr. 126-127). Similarly, Plaintiff's Exhibit 25 consists of ten such clippings taken from California newspapers in December, 1941, containing photographs of California people who appeared at the Stork Club (Tr. 128-129). Plaintiff's Exhibit 26 is a group of 71 clippings and photographs taken from California residents who visited the Stork Club (Tr. 129-130, 135). And Plaintiff's Exhibit 27 consists of 37 clippings and photographs from the year 1946 (Tr. 135-136).

The above clippings are merely samples. In addition to the "thousands and thousands" of such clippings which the appellant has in its files, there are "many thousands of others" which it did not receive due to the fact that the clipping service purports to pick up only about one out of ten such clippings (Tr. 136).

The Stork Club is frequently mentioned, also, by many columnists. Walter Winchell, whose column appears in 800 newspapers, and who has a wider circulation than any other columnist in the United States, mentions the Stork Club "at least four times a week" (Tr. 151); Leonard Lyons, with an outlet of 200 newspapers, mentions the Stork Club in his col-

umns "at least 3 or 4 times weekly" (Tr. 146, 151); and Dorothy Kilgallen, who writes for the Hearst papers, as well as others, refers to the Stork Club "four or five days a week" (Tr. 151-152). Photographic reproductions of 78 of Winchell's columns in which the Stork Club was mentioned, and which appeared in the San Francisco Call-Bulletin, were received in evidence as Plaintiff's Exhibits 52 through 63 (Tr. 185-190).

Other well known writers who were frequent visitors of the Stork Club are Cholly Knickerbocker, Damon Runyon, Bill Corum, Westbrook Pegler, E. V. Durling, Arthur Bugs Baer, Danton Walker, Nick Kenny, Dan Parker, Barklay Beekman, Nancy Randolph, Charles Ventura, Jimmy Jemail, Ed Sullivan, and Hedda Hopper (Tr. 152-153). The Stork Club avowedly curries favor with such columnists for publicity purposes, and permits them to visit the club at any time without reservations (Tr. 153).

Books and magazines. The Stork Club has participated in national advertising campaigns, in conjunction with Buick automobiles and Chesterfield cigarettes, the advertisements appearing in all the large magazines, such as "Cosmopolitan", "Look", and "Life" (Tr. 153-155). In the Buick advertisement a picture of the car was taken in front of the Stork Club canopy, with Clem McCarthy, the newspaper commentator, at the wheel (Tr. 154). The Chesterfield advertisement portrayed a Stork Club hat-check girl with a tray of cigarettes, and it mentioned Sherman Billingsley's Stork Club in New York City (Tr.

154-155). This advertisement, in addition to appearing in the national magazines, was used on color posters which were displayed in subways, newsstands, and drug stores over the entire country (Tr. 154).

A total of twenty-one magazines are in evidence, in each of which the Stork Club is mentioned, and some of which contain complete articles about it. The magazines include eight issues of "Life", one of which contains an article entitled "Life Visits the Stork Club"; five issues of "Time"; two issues of "Good Housekeeping", containing in two installments a story entitled "The Murder in the Stork Club"; one issue of "Collier's"; one issue of the "American", containing an article called "Sherman Packs Them In"; one issue of the "New Yorker", containing an article entitled "The Army Life. Word from Mr. Billingsley"; one issue of the "Saturday Evening Post"; one issue of the "American Mercury", containing an article called "Inside the Stork Club"; and one issue of "Look", containing an article entitled "The Truth About the Stork Club." These magazines are in evidence (Tr. 144, 176-184) as Plaintiff's Exhibits 29-A and 29-B, and Plaintiff's Exhibits 32 through 51.

The above-mentioned story, "The Murder in the Stork Club", was also published in book form (Tr. 145). Still another book about the Stork Club was written by Lucius Beebe, and the Stork Club was paid "15 per cent" for the use of its name (Tr. 147). Both of these books are in evidence as Plaintiff's Exhibits 30 and 31-A, respectively.

Radio. In the radio field, Sherman Billingsley has made numerous personal appearances on coast-to-coast networks. For example, the Rudy Vallee program, with an outlet of 142 stations; "Duffy's Tavern", with an outlet of 132 stations; and the Jinx Falkenberg show, "Blind Date". On all of these programs Billingsley was introduced as managing director of, or as being connected with, the Stork Club, and similar references to the Stork Club were made during the course of the programs (Tr. 141).

Billingsley has also appeared on the "Chesterfield Supper Club", with an outlet of 146 stations, on which program the Stork Club was mentioned at least six or eight times, coast-to-coast. And he has appeared on the NBC New Year's Eve program, on which occasion he was interviewed for four minutes, and the activities of the Stork Club were discussed (Tr. 142).

In addition, the Stork Club has been mentioned on many other programs—all national hook-ups—such as those of Bing Crosby, Frank Sinatra, Eddie Cantor, Sammy Kay, Walter Winchell, Jack Benny, Jimmy Durante, and Fred Allen (Tr. 142, 155-156). Allen has mentioned the Stork Club many, many times (Tr. 156). And during the war, war bond drives were held in the Stork Club itself, when bonds were sold at auction, and such programs were broadcast over a national hook-up (Tr. 153).

Motion pictures. A motion picture entitled "The Stork Club", produced by Paramount Pictures at a cost of close to \$1,700,000 (Tr. 193), and starring

Betty Hutton and Barry Fitzgerald, was given 14,457 exhibitions throughout the United States, during a run of 59 weeks, at a rental of \$3,018,676.26 (Tr. 208-209). In the so-called northern California territory, this picture was given 532 showings, during a run of 60 weeks, at a rental of \$126,588.89 (Tr. 212-213). And in San Francisco alone, during a ten-day run at the Fox Theatre, it was viewed by a total of 83,729 people (Tr. 162). It was exhibited in all of the states (Tr. 194). The sets for the picture were exact replicas of the Stork Club in New York (Tr. 148-149).

Out of seven classifications or standards of quality, "The Stork Club" picture was ranked in the class next to the highest (Tr. 214-215). One of the reasons for its excellence and popularity was the fact that "it had a very salable title, the popularity of the Stork Club was spread all over the United States. It was a very significant name * * *" (Tr. 216). For the use of its name in this picture the Stork Club was paid \$27,500 (Tr. 171).

The Pathe News made a newsreel, "Pathe on Parade", showing exclusive scenes and activities at the Stork Club. This picture was released to the general public (Tr. 150-151). Newsreels are also taken at a fashion show held monthly at the Stork Club and sponsored by the Cosmopolitan Magazine. And these, too, will be shown to the public (Tr. 151).

In addition, the Twentieth Century Fox Film Corporation released a picture in the "March of Time" series, entitled "Night Club Boom", which included scenes from various night clubs in New York City,

including the Stork Club (Tr. 199-200). It was shown in California (Tr. 200). In that picture the commentator described the Stork Club as "the best and most publicized night club in the entire world" (Tr. 150).

As a result of the appellant's extensive advertising and promotional activities, as above described, it has developed a business and reputation which are truly national in scope. As found by the court, "the said plaintiff's, "The Stork Club", has acquired a widespread and valuable reputation, and has commanded and now commands patronage from visitors to New York from throughout the United States; during all of the time said business has been conducted, the same has been, and now is patronized by visitors to New York both from in and about the City of New York and from the United States at large, including the metropolitan area of San Francisco, California; during all of the said time, said business has been and now is patronized by persons of prominence in social, literary, artistic, professional, commercial, official and cinematic circles; on occasions said place of business during all of said time has been, and now is, referred to and written of in various newspapers, magazines and periodicals of local and national circulation; that by reason of the foregoing, the said business of plaintiff conducted and operated under the name "The Stork Club" and with the aforesaid insignia used in conjunction therewith, became and now is known to many persons in and about the City and County of San Francisco, State of California, as a club in New York."

In short, the appellant's business "is known all over the world as the Stork Club" (Tr. 63). Its chief asset is its good will, which is worth more than the tangible assets (Tr. 166-167). At least 70 per cent of its business is "out of town" business, and most of the New York City business consists of celebrities who "come in every night, which makes us sort of a show for the out of town people" (Tr. 168-169). The Stork Club receives patronage from the entire United States, and from outside the United States, and it strives to increase its patronage from the state of California (Tr. 169).

Appellees' Business.

As found by the court, "The defendants on or about April 6, 1945, began the operation of, and continuously since said date have been operating and conducting a small bar, tavern and cocktail lounge at No. 200 Hyde Street, in the City and County of San Francisco, State of California, under the name of 'Stork Club' and at all of said times have been and now are using said name in the conduct of said business" (Tr. 39). The establishment has about ten stools at the bar (Tr. 266), and there are a few tables (Tr. 268); it will accommodate about 50 people (Tr. 272); it has about four steady employees (Tr. 271); it serves only such food as is necessary to comply with the regulations of the State Board of Equalization (Tr. 270); and there is no dancing (Tr. 271), although the match pads distributed by the appellees for advertising purposes depict a dancing couple (Tr. 254).

But the appellees have furnished entertainment from time to time, consisting of a pianist; and for about a month after they took over the establishment they furnished a three-piece orchestra. This orchestra had previously been employed by the appellees' predecessor for a period of two years (Tr. 257, 271). They have advertised a pianist (Tr. 248-250); and they have displayed a panel, suspended from the marquee and extending all around its three sides, with the word "ENTERTAINMENT" emblazoned on each of the three sides (Tr. 257-261). The napkins used in the appellees' establishment advertised the "Finest Liquors Expertly Blended" and "Entertainment" (Tr. 246).

Priority of Appellant's Adoption and Use of its Trade Name and Insignia.

As found by the court, the appellant has continuously been using its trade name, "The Stork Club", since August 15, 1934 (Tr. 38), and likewise since that date has continuously been using in conjunction with such trade name, an insignia consisting of a stork standing on one leg and wearing a high hat and monocle (Tr. 40).

In addition to these findings, the record shows without contradiction that the trade name, "The Stork Club", was used prior to August 15, 1934, and commencing in 1929, by two predecessors of the appellant corporation—namely, Stork Restaurant Corporation and 53 East 51st Street Corporation—in both of which the principal stockholder was Hazel Billingsley, who is likewise the principal stockholder in the appellant

corporation (Tr. 108-110, 164-165). Prior to August 15, 1934, "The Stork Club" was located at 53 East 51st Street (Tr. 109). The trade name and good-will were included in each transfer of the assets (Tr. 109-110, 164, 165). Similarly the insignia, consisting of a stork standing on one leg and wearing a high hat and monocle, has been used consistently and continuously since August, 1934, and was used prior to that time by the appellant's predecessors (Tr. 165).

As found by the court, "the name 'Stork Club' has been used at said premises at 200 Hyde Street by the defendants herein and by the predecessor in interest of said defendants who sold said business to said defendants at all times since the 1st day of March, 1943" (Tr. 43). Prior to that date the establishment was operated under the name "Elbow Room" (Tr. 279). The appellees acquired the business on April 6, 1945 (Tr. 232).

Thus, the appellant's priority in the adoption and use of its trade name and insignia is undisputed.

Appellees' Acts of Infringement and Unfair Competition.

The appellees began operating their "Stork Club" at 200 Hyde Street, San Francisco, California, on or about April 6, 1945, and, as found by the court, "at all of said times have been and are now using said name in the conduct of said business" (Tr. 39). The court, found, further, that "The defendants at all of said times have displayed and maintained, and now are displaying and maintaining a sign affixed to the exterior of said place of business and containing the words 'Stork Club'"; that "said defendants at all

of said times have very slightly advertised their said business in the City and County of San Francisco under the name 'Stork Club' "; that they "have caused said business to be listed in the San Francisco telephone directory under said name and reported their business to governmental departments of the State of California and of the City and County of San Francisco as the 'Stork Club', and have obtained municipal and State licenses in and under said name" (Tr. 42).

In addition, the court found that the "defendants have not caused the aforesaid name 'Stork Club' or related insignia, as hereinabove described, to be used in or about the interior of said defendants' place of business or to be advertised or publicized to patrons therein" (Tr. 42). This finding is utterly without support in the record, and is contrary to the testimony of Nicholas M. Sahati, one of the appellees and their sole witness.

Sahati testified that "there was on the glass panel of the front door the insignia of the stork but no monocle and no top hat" (Tr. 242); and he admitted that he had this insignia removed after the institution of the suit (Tr. 242)—a fact which is not without significance. The witness admitted, also, that there had been used in the appellees' establishment paper napkins bearing the name "Stork Club" and the insignia of a stork standing on one leg and wearing a high hat (Tr. 243). One of the napkins was admitted into evidence (Tr. 245), and a photostatic copy of it appears in the transcript (Tr. 246).

The evidence shows, further, that there was an insignia woven into the carpet near the entrance to the

appellees' establishment. This insignia was a stork standing on one leg with a cane under its wing, and with a top hat and cocktail glass; it was about four square feet in size (Tr. 275). And there was an insignia on a juke box in the appellees' place of business, consisting of a stork standing on one leg, with a top hat, with a diaper in its bill, and with a young lady seated in the diaper (Tr. 276).

The appellees' distributed match pads bearing the words "The Stork Club" (Tr. 251-252, 274-275). One of such pads was admitted into evidence (Tr. 253), and a photostatic copy of it appears in the transcript (Tr. 254). Appellees' manager, who had "complete charge of the premises" (Tr. 248) put out a card advertising the nightly performance of a pianist at the "Stork Club" (Tr. 248-249). The card was admitted into evidence (Tr. 249), and a photostatic copy of it appears in the transcript (Tr. 250). There was some advertising of the appellees' "Stork Club" in magazines (Tr. 247-248).

Appellees' Wilfulness and Bad Faith in Appropriating Appellant's Trade Name and Insignia.

While wilfulness or bad faith on the part of the defendant—or even knowledge of the plaintiff's prior rights—is not a necessary predicate in a suit of this kind, as will later be shown, evidence of such matters does have an important bearing upon certain issues. For this reason, and while the court made no finding on the subject, we point out that the record here shows conclusively that the appellees, at the time they acquired the San Francisco establishment in 1943, had

knowledge of the appellant's prior adoption and use of the name "The Stork Club". Nicholas M. Sahati, one of the appellees, who by his own admission was the "guiding spirit" (Tr. 233) in the purchase and operation of the San Francisco establishment, testified twice that he had heard of the New York Stork Club, although he hastened to add on each occasion and without being questioned on the subject, that he "had no idea of what it embraced or was like", and that he had given no thought to "how extensive an affair it was" (Tr. 263).

In this connection it is to be noted that Sahati was a businessman of considerable experience, being "the active manager of a number of business enterprises that we run, hotels and apartment houses and bowling alleys and the like of that; and a small restaurant at Lake Tahoe" which also "has to do with entertainment" (Tr. 233). In addition, he owned other liquor establishments (Tr. 233) and a place called the "Topper Club" (Tr. 235).

Under the circumstances, in view of the confessed knowledge on the part of this witness that at the time the appellees acquired their business the name Stork Club was already being used by the appellant, and in light of the tremendous reputation which the appellant had established through its nation-wide advertising, there can be no doubt that the appellees not only knew that the name had been used by the appellant prior to their acquisition of the San Francisco establishment, but that they knew, or should have known, that the appellant had used the name

even prior to its adoption and use by the appellees' predecessor in 1943.

It should likewise be pointed out that the appellees offered no explanation whatever in regard to their knowing appropriation of the appellant's trade designations, although Sahati was on the stand and had ample opportunity to do so. The significance of this omission will later be dealt with in the argument.

Laches.

Although laches is not a defense to a suit for injunction, as will later be shown, we shall review briefly the findings and the evidence on this subject.

As found by the court, "The name 'Stork Club' has been used at said premises at 200 Hyde Street by the defendant herein and by the predecessor in interest of said defendants who sold said business to said defendants at all times since the 1st day of March, 1943, and that the said name was publicly and openly displayed on said premises" (Tr. 43). Prior to that date the business was operated under the name "Elbow Room" (Tr. 279). The appellees have owned and operated the business since April 6, 1945 (Tr. 19-20, 232).

The record shows that as early as May 4, 1945, which was only about two years after the name "Stork Club" was first adopted and used in connection with the San Francisco establishment, and only about *one month* after the appellees took over the business, the appellant, acting through its attorneys, prepared and duly mailed a letter addressed to the

“Stork Club, 200 Hyde Street, San Francisco, California”, advising the appellees as to the appellant’s prior rights in the name “The Stork Club” and related insignia, and demanding that they discontinue their use of such name and insignia. It appears, further, that on May 15, 1945, a second letter of the same tenor was mailed to the “Stork Club, 200 Hyde Street, San Francisco, California, Attention N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara, and A. E. Syufy, partners”. These letters were admitted into evidence as Plaintiff’s Exhibits 68 and 69, respectively (Tr. 222-224, 226-227, 283).

Except for the above-mentioned letters of May 4 and May 15, 1945, there is no evidence as to when the appellant first had knowledge that its trade name and insignia were being used by the San Francisco establishment. The complaint was filed on February 25, 1946, or within ten months after the letters were mailed to the appellees.

SPECIFICATIONS OF ERRORS.

1. The court erred in finding that (Tr. 38) the appellant has “no right” in its trade name, “The Stork Club”, in California, and that (Tr. 39) such trade name has “no value” in California.

2. The court erred in finding that (Tr. 39) the appellees’ use of the name “Stork Club” has caused “no damage or detriment” to the appellant, and that (Tr. 40) their use of such name is not deceptive.

3. The court erred in finding that (Tr. 40-43) the appellant did not demand of the appellees that they discontinue their use of the name "Stork Club" and related insignia.

4. The court erred in finding that (Tr. 42) the appellees have not displayed in or about the interior of their place of business the name "Stork Club" or any insignia similar to the appellant's insignia.

5. The court erred in finding that (Tr. 42) the appellees have never profited from the appellant's trade name and insignia.

6. The court erred in finding that (Tr. 42-43) no confusion has arisen or will arise in the minds of the public as to whether the appellees' business is connected or associated with, or under the supervision of, the appellant.

7. The court erred in finding that (Tr. 43) the appellant's trade name, good will, and reputation have not and will not be damaged by the conduct of the appellees.

8. The court erred in finding that (Tr. 43) the extension and development of the appellant's patronage have not and will not be interfered with by the conduct of the appellees.

9. The court erred in admitting into evidence, over objection of the appellant, the testimony of the witness Nicholas N. Sahati, one of the appellees, that the appellees were not in possession of their place of business on May 4, 1945, and on May 15, 1945 (Tr. 264-266).

10. The court erred in finding that (Tr. 43) the appellant has been guilty of laches.

11. The court erred in failing and refusing to adopt the appellant's proposed amendments, deletions and additions to the Findings of Fact (Tr. 26-35), and its proposed deletions and additions to the Conclusions of Law (Tr. 35-37).

12. The court erred in concluding that (Tr. 44) the appellant was not entitled to an injunction as prayed for in the complaint.

13. The judgment is contrary to law.

SUMMARY OF ARGUMENT.

The appellant is the owner of a highly distinctive trade name, "The Stork Club", and an equally distinctive trade insignia, consisting of a stork standing on one leg and wearing a high hat and monocle. These valuable trade designations have been used by the appellant continuously since 1934 in reference to its cafe and night club in New York City. Through an extensive and costly advertising and promotional campaign, conducted for a period of more than ten years, and utilizing such media as newspapers, magazines, books, radio, motion pictures, and the mails, and likewise involving the nation-wide distribution of expensive gift and souvenir items, the appellant's trade name and insignia have acquired a special significance or secondary meaning, and throughout the United States have come to signify but one thing—namely, the appellant's cafe and night club in New York.

In 1943, or nine years after the appellant first adopted and used its distinctive designations, the appellees' predecessor adopted the same name and insignia in reference to the San Francisco establishment later acquired by the appellees in 1945. At the time they purchased this establishment the appellees knew that the appellant had prior rights to the name, "The Stork Club", and the related insignia, but, nevertheless, they wilfully appropriated the same trade designations to their own use and benefit. Their failure to offer any explanation whatever for such conduct indicates that their sole purpose was to trade upon the appellant's good will and reputation and to employ the same to their commercial advantage in order to attract patronage to their place of business; and this obvious motive is, in itself, compelling evidence that the use of the appellant's name and insignia would tend to cause confusion in the public mind by inducing the belief that the appellees' business was in some way associated or connected with that of the appellant, or that it was sponsored or approved by the appellant.

Not only did the appellees deliberately use—and conjunctively—a trade name and insignia which were confusingly similar to the appellant's distinctive designations—but they used them in the same general class of business as that in which the appellant was engaged, and they used them in an area which, by means of the nation-wide publicity campaign designed expressly to achieve such a result, has become an important part of the appellant's market area

from which it draws patronage and custom. The appellees' use of the appellant's designations in such manner is further evidence that the public was likely to confuse the appellees' business with that of the appellant, and it clearly entitles the appellant to the protection of its valuable trade designations in reference to the appellees' business and the California market area. In light of the undisputed evidence and the established legal norms, the trial court's findings and conclusions that there was no confusion, or likelihood of confusion in this case, and that the appellees' conduct did not constitute unfair competition, are clearly erroneous and must be set aside.

Moreover, the appellant has exclusive property rights in its trade name and insignia of inestimable value, in the State of California, and the use of such trade designations by the appellees causes great and irreparable damage and injury to such property rights by diluting and weakening the distinctive character of such trade designations and destroying their value as promotional and advertising devices. The conduct of the appellees, therefore, constituted an invasion and infringement of appellant's property rights in its trade name and insignia and should be enjoined.

And, finally, the trial court's finding that injunctive relief in this case was barred by laches on the part of the appellant is clearly erroneous, inasmuch as such a defense is unavailing in a suit for injunction, and since, in any event, the appellant, upon the undisputed evidence, was not guilty of laches.

ARGUMENT.

I. PRELIMINARY MATTERS.

1. The theories of the case.

The complaint is in two counts. The first count alleges infringement of the appellant's exclusive property right in the trade name, "The Stork Club"; the second alleges acts of "unfair competition" affecting the appellant's trade name, and also its insignia, consisting of a stork standing on one leg and wearing a high hat and monocle. The second count is somewhat more detailed in its allegations concerning the nature and extent of the appellant's business and reputation, the appellees' unlawful practices, and the resulting damage.

The phrase "unfair competition", as applied to the second count, is used merely as a convenient label. As pointed out by Judge Yankwich in *Brooks Bros. v. Brooks Clothing of California*² (1945), 60 F. Supp. 442, 447, 451, such phrase in its literal meaning, is too narrow, since many "unfair" business practices are actionable even though there be no "competition" between the parties. Whether it be called a count for "unfair competition", for "unfair trade practices", or, indeed, for "infringement", the second count is essentially founded in tort "for invasion of the interest in commercial advantages by unprivileged trade practices" (*Rest., Torts*, vol. 3, p. 538), and is based upon the appellees' wrongful conduct in relation to the appellant's trade name and insignia.

²The opinion of Judge Yankwich was affirmed and "adopted" by this Court in 158 F. (2d) 798 (1947).

The first count is based upon the theory that the appellant has an exclusive property right in its trade name in California, and that the acts of the appellees causes irreparable injury and damage to such property. For the sake of clarity, the discussion of this theory will follow that relating to unfair competition.

2. The governing law.

The substantive issues in this case must be determined in accordance with state law. *Erie R. Co. v. Tompkins* (1938), 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. The doctrine of the *Erie R. Co.* case has, of course, been extended to suits in equity. *West v. American Telephone & Telegraph Co.* (1940), 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139; *Guaranty Trust Co. v. York* (1944), 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A.L.R. 1231. And the federal courts will likewise follow the state conflict of laws rules in the event they are applicable. *Klaxon Co. v. Stentor Electric Mfg. Co.* (1941), 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. Since the present case does not involve a technical trademark (that is, a mark which is affixed to goods), much less a trademark which has been registered under the Federal Trademark Act (33 Stat. 724, 15 U.S.C.A. sec. 81 et seq.), and since the jurisdiction of the trial court was grounded solely upon diversity of citizenship and the required jurisdictional amount, there can be no doubt³ that state law is controlling. *Pechner Lozenge*

³We have here no such problem as was presented, for example, in *Philco Corp. v. Phillips Mfg. Co.* (1943), 7 Cir., 133 F. (2d) 663, in which it was held that the federal Trademark Act is in

Co. v. National Candy Co. (1942), 315 U.S. 666, 62 S. Ct. 853, 86 L. Ed. 1103; *Adam Hat Stores v. Lefco* (1943), 3 Cir., 134 F. (2d) 101; Anno.—Trademark Questions—Governing Law, 148 A.L.R. 154 ff.; *Callman, Unfair Competition and Trade Marks*, vol. 2, p. 1581.

It is equally clear that the state law governing this case is that of California, which is not only the situs of the suit, but is also the state in which all of the appellees' wrongful acts occurred. The relevant local law is, therefore, to be ascertained by direct reference, and resort to the state's conflict of laws rules is not necessary. *Adam Hat Stores v. Lefco*, supra, at p. 103. Any doubt which might otherwise exist on this score is completely dissipated by Sections 14400 and 14402, California Business and Professions Code,⁴ which accord to the owner of a trade name first adopted and used "beyond the limits of this State" the same rights and remedies as are granted the owner of a trade name first adopted and used within the state.

certain respects substantive in nature, and that in such respects it raises questions of federal, as distinguished from state law. In this connection see also, Zlinkhoff, *Eric v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition* (1942), 42 Col. L. Rev. 955.

⁴The Code provisions are as follows:

"Sec. 14400: *Ownership.* Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner." (Added by Stats. 1941, chap. 59, Sec. 1, p. 709.)

"Sec. 14402: *Remedy for violation of rights.* Any court of competent jurisdiction may restrain, by injunction, any use of trade names in violation of the rights defined in this chapter." (Added by Stats. 1941, chap. 59, Sec. 1, p. 710.)

While main reliance in this brief will necessarily be placed upon the law of California, both statutory and decisional (including decisions of the federal courts applying the state law), reference will be made, also, to other cases and authorities where they are not inconsistent with the law of California. It may be said, in passing, that the appellant's right to an injunction is supported not only by the declared law of California, but likewise by the weight of authority elsewhere.

3. The weight to be accorded the trial court's findings.

The findings of the trial court "shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52 (a), F.R.C.P. But "to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, they are not binding upon this Court". *Aetna Life Ins. Co. v. Kepler* (1941), 8 Cir., 116 F. (2d) 1, 5; see also, *Sanders v. Leech* (1946), 5 Cir., 158 F. (2d) 486; *United States v. Still* (1946), 4 Cir., 120 F. (2d) 876, 878, cert. den. 314, U.S. 671, 62 S. Ct. 135, 86 L. Ed. 537; *Campana Corporation v. Harrison* (1940), 7 Cir., 114 F. (2d) 400, 405-406.

In the present case, as we have seen, there is no substantial conflict in the evidence. The only findings of the trial court which are questioned on this appeal are either unsupported by any evidence whatever, or

were induced by erroneous views of the law. Therefore, they are not binding on this Court and should be set aside.

Moreover, all of the testimony relating to the appellant's adoption and use of its trade name and insignia, and the nature and scope of its business and reputation, was introduced in the form of depositions. To the extent that the trial court's findings may be inconsistent with such evidence, they will be given but "slight" weight. *Equitable Life Assur. Soc. v. Irelan* (1941), 9 Cir., 123 F. (2d) 462, 464. As was said in that case, "This court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that". See also, *Smith v. Royal Ins. Co.* (1942), 9 Cir., 125 F. (2d) 222, 224, cert. den. 316 U.S. 695, 62 S. Ct. 1291, 86 L. Ed. 1765.

II. THE APPELLANT IS ENTITLED TO AN INJUNCTION UPON THE THEORY OF UNFAIR COMPETITION.

1. What constitutes "unfair competition"—in general.

In drawing the line between commercial practices which will be enjoined as "unfair" and those which will not, the courts have not always agreed. This lack of harmony in the case law has resulted in large measure from the fact that "the scope of liability in this field is constantly expanding. This is due partly to the flexibility and breadth of equitable relief and partly to changing methods of business and changing standards of commercial morality." *Rest., Torts*, vol. 3, p. 538.

Thus, there appears to be less conflict among the modern cases than there is between them and the older decisions. And this has led the courts to place greater emphasis upon the more recent cases. Hence the oft-quoted remark of the Eighth Circuit Court of Appeals in the *Philco* case, *supra*, at p. 672, that "a 1905 restatement of State common law rules governing the use of trade-marks may not furnish an adequate answer to the trade-mark problems in 1943."

While the law in this field is by no means static,⁵ certain principles have emerged as to which there can be no dispute. In postulating these general rules and definitions, we find it convenient to draw upon the Restatement of Torts,⁶ with the *caveat* that the Restatement uses the term "infringement" in its broad non-technical sense.

As in the case of a technical trade-mark, which must be affixed to goods, and as to which exclusive rights may be created merely by prior adoption and use, a trade name or insignia is entitled to protection

⁵See, Schechter, the Rational Basis of Trade-Mark Protection (1927), 40 Harv. L. Rev. 813; Schechter, Fog and Fiction in Trade-Mark Protection (1936), 36 Col. L. Rev. 60; Chafee, Unfair Competition (1940), 53 Harv. L. Rev. 1289; Handler and Pickett, Trade Marks and Trade Names—An Analysis and Synthesis (1930), 30 Col. L. Rev. 168.

⁶In this we follow the example set by Judge Yankwich in *Brooks Bros. v. Brooks Clothing of California*, *supra*, who confessed his "bewilderment resulting from an attempt to reconcile the large number of state decisions, or even the large number by federal district and circuit court decisions upon any one topic pertaining to this subject" (p. 448).

It is to be noted, also, that the *Restatement* was quoted extensively by the Supreme Court of California in the recent case of *Eastern-Columbia, Inc. v. Waldman*, decided June 13, 1947, 30 A. C. 269, 273-274.

when it has become known in the market as "the name for goods or services coming from or through a particular source or the name for a particular business." *Rest., Torts*, vol. 3, p. 559.

Thus, a trade name is defined as "any designation which (a) is adopted and used by a person to denominate goods which he markets or services which he renders or a business which he conducts, or has come to be so used by others, and (b) through its association with such goods, services or business, has acquired a special significance as the name thereof * * *" *Rest., Torts*, vol. 3, sec. 716, p. 558. The "designation" may be either a name or an insignia. The present case, of course, involves both.

The term "special significance" embraces the concept of "secondary meaning", which is the term commonly used in the case law. *Rest., Torts*, vol. 3, p. 560. Actually, the phrase "secondary meaning" does not mean "a subordinate and rare significance"; it means, rather, "a subsequent significance added to the previous meaning of the designation and becoming in the market its usual and primary significance." *Rest., Torts*, vol. 3, p. 560. As a California court has said, the secondary meaning "submerges the primary meaning * * * and the new meaning survives as the identification, in the market, of a product and its source." *Winfield v. Charles*, decided November 29, 1946, 77 A.C.A. 80. See also, *Eastern-Columbia, Inc. v. Waldman*, supra, note 6; *Callman*, supra, p. 1012 ff. Obviously, the more distinctive the designation, the more readily will it acquire a special significance.

As to the elements of infringement, "One infringes another's trade name, if (a) without a privilege to do so, he uses in his business, in the manner of a trade mark or trade name, a designation which is identical with or confusingly similar to the other's trade name, though he does not use the designation for the purpose of deception, and (b) the other's interest in his trade name is protected with reference to (i) the goods, services or business in connection with which the actor uses his designation, and (ii) the markets in which the actor uses his designation". *Rest., Torts*, vol. 3, sec. 717, p. 562.

As the court said in the *Brooks Bros.* case, *supra*, at p. 450, the liability thus imposed protects "a person against harm to his business which the actor *might* cause by misleading prospective purchasers into identifying the actor's goods, services *or business* with those of the other. The ultimate issue in infringement cases is the *likelihood* that prospective purchasers will be so misled'" (emphasis ours). See also, *Rest., Torts*, vol. 3, p. 567.

It should be emphasized that actionable confusion in the present case does not rest upon the proposition that the public is apt to mistake the appellees' *place* of business for the appellant's establishment. The gravamen of this case is the likelihood, as we shall show, that the public will be led to believe that the appellees' business is in some way associated or connected with that of the appellant, or is under the supervision or sponsorship of the appellant—in other words, the likelihood that the two businesses will "be regarded by prospective purchasers as associated with

the *source* identified by the trade mark or trade name" (*Rest., Torts*, vol. 3, sec. 730, p. 596; emphasis ours).

The "confusion of source" concept is now the accepted doctrine in this field of the law, not only generally (*Brooks Bros. v. Brooks Clothing of California*, supra; Anno.—Infringement of Trademark or Tradename, 148 A. L. R. 12, 53 ff., and cases therein cited; *Callman*, supra, vol. 2, pp. 116-1121), but in California as well. See, for example, *Eastern-Columbia, Inc. v. Waldman*, supra, note 6; *Winfield v. Charles*, supra; *Jackman v. Mau*, decided February 21, 1947, 78 A. C. A. 258; *Physicians Electric Service Corp. v. Adams*, decided May 8, 1947, 79 A.C.A. 675; *Academy of Motion Picture Arts & Sciences v. Benson* (1940), 15 C. (2d) 685; *Law v. Crist* (1940), 41 C. A. (2d) 862; *Carolina Pines, Inc. v. Catalina Pines* (1932), 128 C. A. 84; *Evans v. Shockley* (1922), 58 C. A. 427; *Wood v. Peffer* (1942), 55 C. A. (2d) 116.

The particular elements embodied in the above definition of infringement will be discussed separately. It should be borne in mind, however, that they are all mere facets of the central issue of confusion. Thus, whether there is a likelihood of confusion depends in part upon (1) the similarity between the appellant's trade name and insignia and those of the appellees, (2) the nature of the businesses involved, and (3) the geographical relationship between the appellant's business activities and those of the appellees.

In addition, the ultimate issue of confusion is affected by two additional considerations which have

an important bearing upon the present case—namely, (1) the fact that the appellant's trade name and insignia are highly distinctive, and (2) the fact that they were appropriated by the appellees with knowledge that they were already being used in connection with the appellant's business. These factors will likewise be treated separately, although they pervade the entire case.

2. The appellant has acquired a special significance or secondary meaning in its trade name and insignia.

That the name, "The Stork Club", and its related insignia have long since acquired a special significance or secondary meaning is not open to dispute. The trial court, in effect, so found, and the evidence on the subject is overwhelming. See Summary of Evidence, *supra*, under the headings "Priority of Appellant's Adoption and Use of its Trade Name and Insignia" and "Nature and Extent of Appellant's Business and Reputation."

The court found, to be sure, that "the plaintiff's trade name 'The Stork Club' has no value in the State of California" (Tr. 39), but this finding seemingly should be construed as meaning merely that the appellant was not entitled to protection of its trade name and insignia in California; and, so construed, it will be dealt with hereinafter. Otherwise the finding would be in conflict with others, such as number IX (Tr. 41), in which the court found, *inter alia*, that the appellant's name has acquired a "widespread and valuable reputation" throughout the United States; that the appellant's business has always drawn patronage "both from in and about the City of New

York and from the United States at large, including the metropolitan area of San Francisco, California"; and that the appellant's name and insignia "became and now is known to many persons in and about the City and County of San Francisco, State of California, as a club in New York" (emphasis ours).

It thus appears that the appellant's trade name and insignia have become the hallmarks of its business throughout the United States, including California and, specifically, the San Francisco metropolitan area, and that the appellant actually draws patronage from all such areas. The importance of the court's finding in this regard will become increasingly evident when we later discuss the question of confusion. However, it should be observed at this point that the denial of injunctive relief in this case, in the face of the court's own findings regarding the value and reputation of the appellant's trade designations throughout the United States, and the mass of undisputed evidence in support of such findings, indicates that the court was not fully cognizant of the legal principles applicable to this type of case.

3. The trade name and insignia used by the appellees are confusingly similar to the appellant's designations.

In considering the issue of confusion, we are confronted at the outset with the bald fact that with "all the rest of infinity" open to them (*Coca-Cola v. Old Dominion Beverage Corp.* (1921), 4 Cir., 271 F. 600, 604, cert. den. 256 U.S. 703, 41 S. Ct. 624, 65 L. Ed. 1179), the appellees adopted and used a trade name which is virtually identical with the appellant's

highly distinctive name, and, in addition, they employed trade insignias which are substantially similar to the appellant's highly distinctive insignia. Under such circumstances, it seems indisputable that prospective purchasers are likely to regard such designations as indicating the source identified by the appellant's designations. *Rest., Torts*, vol. 3, sec. 728, p. 590.

The evidence in this regard may be charted as follows:

<u>Appellant</u>	<u>Appellees</u>
<i>Trade name</i>	
“The Stork Club”	“Stork Club” (marquee)
	“Stork Club” (telephone directory)
	“Stork Club” (state and municipal licenses)
	“Stork Club” (napkins)
	“Stork Club” (card advertising pianist)
	“The Stork Club” (match pads)
<i>Insignia</i>	
Stork standing on one leg, wearing high hat and monocle	Stork, with no top hat or monocle (glass panel on front door)
	Stork standing on one leg, wearing high hat (napkins)
	Stork standing on one leg, with cane under wing, and with top hat and cocktail glass (carpet)
	Stork standing on one leg, with top hat, with diaper in bill, and with young lady seated in diaper (jukebox)

While a vis-à-vis comparison of the names and insignias is not the sole test in determining the question of confusing similarity, since in the usual situation "the buyer viewing the mark of the defendant must rely upon his memory of the plaintiff's mark" (*Callman*, supra, at p. 1131), it is clear that by any standard of comparison the designations used by the appellees are confusingly similar to those of the appellant. A brief reference to the California cases is sufficient to dispel any doubt which may exist on this score.⁷

In regard to the similarity of insignias, it is to be noted, parenthetically, that according to the trial court's finding, no such insignias were used by the appellees. But this finding, as we have already shown in the above Summary of Evidence, under the head-

⁷As to trade names, the California courts have found confusing similarity in the following situations, the name infringed being numbered "(1)" and the infringing name, "(2)": (1) Eastern-Columbia, (2) Western-Columbia, *Eastern-Columbia, Inc. v. Waldman*, supra; (1) Jackman, (2) Jackman, *Jackman v. Mau*, supra; (1) Carolina Pines, (2) Catalina Pines, *Carolina Pines, Inc. v. Catalina Pines*, supra; (1) Old Homestead, (2) New Homestead, *Banzhof v. Chase* (1907), 150 C. 180; (1) Merton, (2) Morton's, *Morton v. Morton* (1905), 148 C. 142; (1) The Academy, The Motion Picture Academy, (2) The Hollywood Motion Picture Academy, *Academy of Motion Picture Arts & Sciences v. Benson*, supra; (1) Active Transfer Company, Active Parcel Delivery, (2) Action Transfer Company, Action Parcel Delivery, *Jaynes v. Weickman* (1921), 55 C. A. 557; (1) Adolph M. Schwarz, Commercial Collections, everywhere, (2) Adolph M. Schwarz, Jr., Commercial Collections, anywhere, *Schwarz v. Schwarz* (1928), 93 C. A. 252; (1) Cyclops Machine Works, (2) Cyclops Iron Works, *Hainque v. Cyclops Iron Works* (1902), 136 C. 351; (1) Mechanics Store, (2) Mechanical Store, *Weinstock, Lubin & Co. v. Marks* (1895), 109 C. 529.

As to insignias, see *Sun-Maid Raisin Growers v. Mosesian* (1927), 84 C. A. 485, 495; *Jackman v. Mau*, supra, at p. 263; *Academy of Motion Picture Arts & Sciences v. Benson*, supra, at p. 692.

ing "Appellees' Acts of Infringement and Unfair Competition", has no support whatever in the record and is contrary to the undisputed evidence.

The similarity between the designations used by the appellees and those of the appellant is, of course, a vital factor in resolving the ultimate issue of confusion. Here, the importance of such factor is magnified by the fact that the appellees were not content merely to use the appellant's trade name; they used *both* the name and the insignia.

Furthermore, the likelihood of confusion was greatly accentuated by the fact that the appellant's trade name and insignia are highly distinctive and, therefore, would readily be regarded by the public as indicating the "source" of any business which might adopt them. And when further consideration is given to the fact that the appellant's trade designations were wilfully appropriated by the appellees, without explanation, and presumably for the sole purpose of trading upon the appellant's good will and reputation, there would seem to be no doubt whatever that there was a likelihood of confusion in this case and that the appellant, accordingly, was entitled to an injunction.

The above factors—namely, the distinctiveness of the appellant's trade designations, and the failure of the appellees to explain or justify their knowing appropriation of them, are of sufficient importance that they will now be given special consideration.

4. The appellant's trade name and insignia are highly distinctive and are, therefore, entitled to the utmost protection.

It requires no argument to show that the appellant's trade name and insignia are highly unique, arbitrary, and fanciful. The test, of course, is not whether the word "stork" is to be found in the dictionary, but whether the dictionary gives it the meaning it has when applied to the appellant's cafe and night club in New York. As stated in *Philadelphia Storage Battery Co. v. Mindlin* (1937), 163 Misc. 52, 296 N. Y. S. 176, 181-182:

"The fear is sometimes expressed that the extension of protection may foster monopoly, not merely of language but of trade. The fear is groundless. He who coins a trade symbol adds rather than detracts from the language. Even when a term in a dictionary is used in an arbitrary manner, the language is not impoverished. The term may still be used in its accepted sense; what equity prevents is the appropriation of the new layers of meaning that have been added by the plaintiff. The rights of the first user can be sustained to the extent that they do not unduly handicap others in the honest conduct of their business. New competition and enterprise 'must not be throttled, but the late comer should be compelled to rely upon his own ingenuity, rather than misrepresentation and misappropriation for the creation of his market. This much at least is demanded by the most elementary notions of honesty.' Handler, *Unfair Competition*, 21 *Iowa Law Review*, 175, 186. Blatant imitation should not be recognized by the judicial condonation of practices which violate the fundamental precepts of fair business dealing."

It is obvious that the "more distinctive the trade-mark is, the greater its influence in stimulating sales, its hold on the memory of purchasers and the likelihood of associating similar designations on other goods with the same source." *Rest., Torts*, vol. 3, p. 602. Distinctive designations have thus come to be regarded as "strong" marks or names, and non-distinctive designations as "weak". And common generic words, such as "Ivory" (soap) or "Blue Goose" (fruit), have often been recognized as "strong". See *Callman*, *supra*, p. 1226 ff.

Realizing that highly distinctive designations, unless closely guarded, will lose their character and their advertising value, the courts have been careful to protect them against gradual encroachment. As said in *Arrow Distilleries v. Globe Brewing Co.* (1941), 4 Cir., 117 F. (2d) 347, 351:

"* * * the rule that coined or fanciful marks or names should be given a much broader degree of protection than words in common use is sound, for it recognizes not only the orthodox basis of the law of trade-marks that the sale of the goods of one manufacturer or vendor as those of another should be prevented, but also the fact that in modern business the trade-mark performs the added function of an advertising device, whose value may be injured or destroyed unless protected by the courts. Schechter, *The Rational Basis of Trade Mark Protection*, 40 *Harvard Law Review* 813; *Restatement of Torts*, sec. 715 (b)."

In *Lady Esther v. Lady Esther Corset Shoppe* (1943), 317 Ill. App. 451, 46 N. E. (2d) 165, 148

A. L. R. 6, which involved the distinctive name "Lady Esther" as applied to the plaintiff's cosmetics, the court said (p. 11):

"In the instant case we think it clear that the public might be deceived into thinking there was some connection between the defendant and the plaintiff companies. *And the good-will of plaintiff, which it had built up at great expense over a period of years, would be whittled away. Courts of equity ought not to be so feeble as to be unable to prevent this*" (emphasis ours).

As the Court observed in *Cleo Syrup Corp. v. Coca-Cola Co.* (1943), 8 Cir., 139 F. (2d) 416, 417; 150 A. L. R. 1056, cert. den. 321 U.S. 781, 64 S. Ct. 638, 88 L. Ed. 1074:

" * * * There is no merit in the contention that a court of equity will not afford protection to the plaintiff's trademark *or prevent its good will from being nibbled away by unfair competitors*" (emphasis ours).

We need not multiply the authorities, except to point out that the California courts are in accord. For example, in *Katschinski v. Keller* (1920), 49 C. A. 406, the word "Philadelphia" was held to be "purely arbitrary and fanciful" as applied to a retail shoe store; in *Hall v. Holstrom* (1930), 106 C. A. 563, the name "The White Spot", as applied to a restaurant, was found by the trial court to be "purely and entirely fanciful and artificial", and such finding was not questioned on appeal; and finally, in the recent case of *Eastern-Columbia, Inc. v. Waldman*, *supra*,

note 6, the words "Eastern-Columbia" were found to have acquired a "fanciful" meaning in reference to a chain store.

It should be emphasized in the present case that the name "The Stork Club" is, in itself, conspicuously distinctive. Likewise, the stork insignia is, in itself, extremely distinctive. When used together, as they are by the appellant, they become an unmistakable symbol of its business.

Not only are the appellant's trade name and insignia intrinsically "strong", but their natural attributes as trade designations have been greatly enhanced by the fact that the appellant has spent hundreds of thousands of dollars in promoting and publicizing them throughout the United States, as a result of which they have acquired a meaning and an advertising appeal which is indeed unique. As said in *Callman*, supra, at p. 1226, "a mark can be distinctive either because it is unique, that is, distinctive in itself, because it has been the subject of wide and intensive advertisement, or because of a combination of both." Here we have a combination of both.

Moreover, we are not here dealing with a name or mark such as "Blue Ribbon", or "Gold Medal", or "Acme", which has been used in a variety of ways in the market and has thereby been weakened as a trade or advertising device. Obviously, the "greater the number of identical or more or less similar trade-marks already in use on different kinds of goods, the

less is the likelihood of confusion * * *.” *Rest., Torts*, vol. 3, p. 596. We are dealing with designations which are understood everywhere as having reference to “a club in New York”.

In short, the appellant’s business “is known all over the world as the Stork Club” (Tr. 63), and the good will which it has thus established, over a long period of time and at great expense, is worth more than its tangible assets (Tr. 166-167). The appellant is entitled to protection from the erosive “borrowing” by others of its valuable trade designations.

Although the trial court found, in effect, as we have seen, that the appellant’s trade name and insignia have acquired a special significance or secondary meaning, the court refused to adopt the appellant’s proposed finding (Tr. 34) that such designations were “purely and entirely fanciful and artificial”. It thus appears that the court, in resolving the issue of confusion, did not give sufficient weight to the fact that the appellant’s name and insignia were highly distinctive and, as such, were entitled to the fullest protection against “whittling away” or “nibbling away”, and that it did not fully recognize, as other courts have done, the familiar adage that the camel that gets his head under the flap will soon steal the whole tent.

5. The appellees' failure to "explain" their wilful appropriation of the appellant's trade name and insignia is strong evidence that they have been trading upon the appellant's good will and reputation.

Although "fraud", "bad faith", or "intent to deceive", is not a *sine qua non* in suits to enjoin unfair trade practices,⁸ the presence of such an element has a forceful bearing upon the ultimate issue of confusion. This is only natural, since "the intent to deceive gives rise to a presumption of its successful realization." *Callman*, supra, at p. 1236.

In countless cases, and in many of those cited elsewhere in this brief, the courts have been strongly influenced by the defendant's motive in adopting and using a designation similar to that of the plaintiff; and where the defendant is unable to explain or justify his conduct, the courts have properly inferred that his purpose was to trade upon the plaintiff's good will and reputation. The burden of proof is upon the defendant to negate the inference of confusion. *Time, Inc. v. Ultem Publications* (1938), 2 Cir., 96 F. (2d) 164, 165; *My-T-Fine Corporation v. Samuels*

⁸This is the settled rule, not only generally (*Rest., Torts*, sec. 717, pp. 562, 565), but in California as well. *Wood v. Peffer*, supra, at p. 124; *Hoover Co. v. Groger* (1936), 12 C. A. (2d) 417, 419; *Sun-Maid Raisin Growers v. Mosesian*, supra, at p. 497; *Dodge Stationery Co. v. Dodge* (1904), 145 C. 380, 390. As said in *Wood v. Peffer*, supra, "So far as injunctive relief is concerned, it was not necessary to prove that the conduct of defendant was fraudulent. It will be noted that while the Beechnut Packing Company case, supra, and some of the other cases, speak of 'unfair and fraudulent' competition, section 3369, supra, mentions these elements in the disjunctive, thus providing for injunctive relief where the conduct is unfair, even though there is no element of fraud." (Citing cases.)

(1934), 2 Cir., 69 F. (2d) 76; *Cleo Syrup Corp. v. Coca-Cola Co.*, supra.

And this inference is particularly strong where, as here, the plaintiff's designation is so distinctive as to defy the possibility of its innocent independent invention by the defendant. "Where a defendant selects from his 'practically unlimited field of distinctive names', a trade-mark entirely unrelated to and dissociated from his business, and the mark chosen is identical to or confusingly similar with the mark publicly associated with the plaintiff's products then it would appear indisputable that the defendant made the particular choice so as to trade upon the plaintiff's established reputation." *Callman*, supra, at p. 1245. See also, *Rest., Torts*, Vol. 3, p. 595.

In *Time, Inc. v. Ultem Publications*, supra, the plaintiff brought suit to protect its registered trademark "Life", as the title of a magazine, and to stop unfair competition in the make-up of the defendant's magazine cover. In affirming an interlocutory injunction, the court said (p. 164):

"* * * There is no suggestion that such a combination had ever appeared before the plaintiff adopted it, nor does the defendant attempt to excuse imitating it so closely. It is of course true that nobody would buy 'Movie Life', supposing it to be 'Life', but that possibility is not the only grievance of which the plaintiff may complain. Similarity of make-up usually signifies the same source; the publisher of 'Movie Life' is likely to be taken as the publisher of 'Life'; if so, the plaintiff may insist that its reputation shall be of

its own making alone. [Citing cases.] It is probably too soon to learn whether any actual confusion will result, certainly the plaintiff has not so proved that it has yet done so; but the similarity could scarcely have been accidental in origin, and the defendant refused to make any change when challenged at the very outset. Imitation may supply the place of proof; the plagiarist's motive can only be some advantage to himself, which is most likely to be, in part at any rate, the likelihood that his wares will be taken as first-comer's. *It rests with him to disprove this natural inference; until he does we may accept his own estimate of the probabilities.* While, therefore, the defendant may be able to prove upon the trial that no confusion can arise, until it does, if it wishes to use the title, 'Movie Life', it must change the color of the cover so as clearly to distinguish from that of the plaintiff." (Emphasis ours.)

In *My-T-Fine Corporation v. Samuels*, supra, in which the defendants were enjoined from imitating the make-up of a cardboard box used by the plaintiff, the court ruled that (p. 77):

"* * * The plaintiff has proved no more than that the boxes look a good deal alike, and that confusion may well arise; and were it not for the evidence of the defendants' intent to deceive and so to secure the plaintiff's customers, we should scarcely feel justified in interfering at this stage of the cause. We need not say whether that intent is always a necessary element in such causes of suit; probably it originally was in federal courts. [Citing cases.] But when it appears, we think that it has an important procedural result;

a late comer who deliberately copies the dress of his competitors already in the field, must at least prove that his effort has been futile. Prima facie the court will treat his opinion so disclosed as expert and will not assume that it was erroneous. [Citing cases.] He may indeed succeed in showing that it was; that, however bad his purpose, it will fail in execution; if he does, he will win. [Citing case.] *But such an intent raises a presumption that customers will be deceived.*" (Emphasis ours.)

In *Buckspan v. Hudson's Bay Co.* (1927), 5 Cir., 22 F. (2d) 721, 723, the court said:

"* * * In the absence of any plausible explanation of the appellant's adoption of a name so similar to that by which appellee was commonly known in Dallas, as elsewhere throughout the English-speaking part of the world, it may be inferred that the reason for so imitating appellee's name was to secure the advantages which would result from a supposed connection with a historically famous collector of and trader in furs."

In *Wall v. Rolls-Royce of America* (1925), 3 Cir., 4 F. (2d) 333, 334, the court observed that

"* * * Upon no other theory than a purposed appropriation to himself, and an intent to convey to the public a false impression of some supposed connection with the Rolls-Royce industries, can Wall's actions and advertisements be explained."

In *Socony-Vacuum Oil Co. v. Lafariere* (1944), 48 N.Y.S. (2d) 421, 422, the court pointed out that

“* * * With all the names available for an oil burner servicing business it is difficult to conceive what purpose defendant or his predecessor had in choosing ‘Standard’ to be used in connection with the words oil burner as a trade name unless it was intended to benefit from the well known name ‘Standard Oil.’”

As this Court said in *Del Monte Special Food Co. v. California Packing Corp.* (1929), 9 Cir., 34 F. (2d) 774, 775:

“* * * No motive is suggested or discernible for the use of the words ‘Del Monte Brand’ in connection with the sale of oleomargerine other than the desire and expectation of securing some benefit from the extensive advertising campaign and vast business operations of the appellee.”

In *Lou Schneider, Inc. v. Carl Gutman & Co.* (1946), D. C., S. D. N. Y., 69 F. Supp. 392, which, like the present case, involved both a name and an insignia, the court remarked that (p. 395):

“* * * Here defendant, not content with the use of ‘Bonnie Lassie’ also adopted the Scotch dancing girl as a mark. Why, out of all the many other designs it could have appropriated, it saw fit to use this one is inexplicable on any other theory than that it saw some advantage accruing to it from the publicity of plaintiff’s wares.”

And, finally in *Stork Restaurants, Inc. v. Marcus* (1941), D. C., E. D. Pa., 36 F. Supp. 90, 93, the court was impressed by the fact that with “an infinity of names and insignia, real and fanciful, from which to

choose, the defendants appropriated a designation practically identical to that of the plaintiff * * *.” The court found that the “defendant has not given a satisfactory explanation of his choice of the name ‘The Stork Club’ for his place of business” (p. 92).

It has thus been established that an intent to deceive may be inferred from the mere fact that the defendant adopts and uses a designation which is so similar to the plaintiff’s that “the similarity could scarcely have been accidental in origin” (*Time, Inc. v. Ultem Publications*, supra, at p. 164), where the defendant is able to furnish no other satisfactory explanation. In the present case the trade name and insignia used by the appellees were, as we have shown, so closely similar to, if not identical with, the appellant’s highly distinctive designations as to leave no room to doubt that they were wilfully pirated; and the record is completely void of any “explanation”, although the appellee Nicholas N. Sahati was on the stand and had every opportunity to present an explanation if any there had been.

But the present case is even stronger. The appellees not only failed to “explain” their use of the appellant’s trade name and insignia; they admitted that at the time they purchased their business in 1945 they had knowledge that the name, “The Stork Club”, was being used by the appellant. The witness Sahati, who by his own admission was the “guiding spirit” (Tr. 233) in the purchase and operation of the appellees’ business, testified twice that he had heard of the New York Stork Club, although he hastened to

add on each occasion and without being questioned on the subject, that he "had no idea of what is embraced or was like", and that he had given no thought to "how extensive an affair it was" (Tr. 263). Although the witness did not confess specific knowledge that the appellant's use was prior to that of the appellees' predecessor, who had used the name "Stork Club" since 1943, and was studiously evasive when pressed for an indication of *how long* he had known about the appellant's establishment (Tr. 263), it is clear, to say the least, that he had sufficient information to put him and the other appellees on inquiry as to such fact, and that they are charged with knowledge of the appellant's priority of use not only as to them but also as to their predecessor.

In this connection, it is to be noted that Sahati was a business man of considerable experience, being "the active manager of a number of business enterprises that we run, hotels and apartment houses and bowling alleys and the like of that; and a small restaurant at Lake Tahoe" which also "has to do with entertainment" (Tr. 233). In addition, he owned other liquor establishments (Tr. 233) and a place called the "Topper Club" (Tr. 235). Under the circumstances, and in light of the tremendous reputation which the appellant had established through its nation-wide advertising, it does not tax credulity to say that he either knew, or should have known, specifically that the appellant was using the name, "The Stork Club", even prior to 1943, the year in which the name was first used in reference to the San Francisco establishment.

It should be emphasized that the court made no finding on the question of intent, although specifically requested to do so (Tr. 28, 30). And such failure indicates that the court did not give proper weight to this aspect of the case. We submit that, under the above authorities, this Court should give full weight to the appellees' "own estimate of the probabilities". If, as they themselves presumably believed, the use of the appellant's trade name and insignia would tend to attract customers to their place of business, it seems proper to conclude that such customers would very likely believe that there was some connection between the appellee's business and that of the appellant, or that they were under the same ownership or management, or that the appellees' establishment was sponsored or approved by the appellant. The appellant was entitled to an injunction as a safeguard against the possibility of such confusion.

6. The appellant's trade name and insignia are entitled to protection in reference to the appellees' business.

Thus far we have shown that the appellant's trade name, according to the trial court's own findings, has acquired a "wide-spread and valuable reputation" throughout the United States, and that such name, and its related insignia, "became and is now known to many persons in and about the City and County of San Francisco, State of California, as a Club in New York"; that there is a striking and unmistakable similarity, if not identity, between the appellant's highly distinctive trade name and insignia and the designations employed by the appellees; and that the

failure of the appellees to explain or justify their wilful appropriation of the appellant's valuable and distinctive trade designations indicates that their sole purpose was to trade upon the appellant's good will and reputation by inducing the public to believe that there was some connection or association between their business and that of the appellant.

Under such circumstances it would seem almost self-evident that there is a likelihood, if not a certainty, of confusion and that the appellant, as a matter of law, is entitled to an injunction. When we consider the further fact that the appellees' business was within the same general class as the appellant's, there would seem to be no need to discuss the question of whether the appellant is entitled to injunctive relief in reference to the appellees' business—particularly, since the appellees themselves, by their deliberate appropriation of the appellant's trade name and insignia, presumably believed that their business was sufficiently related to the appellant's that their use of the latter's trade designations would redound to their commercial advantage. If they did not so believe, then why did they adopt the name "Stork Club" for their business? And why did they go further and adopt the stork insignia as a trade symbol? Why did they not choose some other name out of the "infinity" which was at their disposal?

Although the appellees' business was not in direct competition with the appellant's, the absence of competition confers upon them no immunity. It is clearly established by the case law that there may be a like-

lihood of confusion even though the goods or businesses involved are non-competitive. This view is based upon the practical realization that in many instances of trade name piracy the diversion of trade or custom from the owner of the trade name to the appropriator is neither the purpose nor the result. While the earlier cases usually involved competitors engaged in the same kind of business or marketing the same kind of goods, "More subtle forms of infringement developed later when trade-marks and trade names became not simply indicia of source to purchasers who cared about source, but also powerful advertising and sale factors. An attractive, reputable trade-mark or trade name could then be imitated not for the purpose of diverting trade from the person having the trade-mark or trade name to the imitator, but rather for the purpose of securing for the imitator's goods some of the good-will, advertising and sales stimulation of the trade-mark or trade name. * * *" *Rest., Torts*, vol. 3, p. 597. And where, for example, a customer, as a result of such "sales stimulation", has an unsatisfactory experience with the imitator, he may hold the owner of the trade name or mark responsible therefor. If he has previously dealt with such owner, or purchased his goods, he may transfer his allegiance to some other business or commodity; or, if he has not previously dealt with the owner of the trade name or mark, he may decline in the future to do so. What's more, he may induce others to act in the same way. Hence the court will protect the owner from the risks involved where his

trade designation is used in another business over which he has no control, even though such business is a non-competitive one.

The modern view—that there may be a likelihood of confusion even though the parties are not competing with each other in the market—is perhaps best expressed in the classic and much quoted statement of Judge Learned Hand in *Yale Electric Corporation v. Robertson* (1928), 2 Cir., 26 F. (2d) 972, 973, as follows:

“* * * The law of unfair trade comes down very nearly to this—as judges have repeated again and again—that one merchant shall not divert customers from another by representing what he sells as emanating from the second. This has been, and perhaps even more now is, the whole Law and Prophets on the subject, though it assumes many guises. Therefore it was at first a debatable point, whether a merchant’s good will, indicated by his mark, could extend beyond such goods as he sold. How could he lose bargains which he had no means to fill? What harm did it do a chewing gum maker to have an ironmonger use his trade-mark? The law often ignores the nicer sensibilities.

“However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner’s reputation, whose qual-

ity no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful." (Citing cases; emphasis ours.)

The cases in support of this view are legion. The "rule declared by our Ninth Circuit Court of Appeals is that competition is not necessary". *Brooks Bros. v. Brooks Clothing of California*, supra, at p. 451. See also *Del Monte Special Food Co. v. California Packing Corp.*, supra; *Horlick's Malted Milk Corp. v. Horluck's Inc.* (1932), 9 Cir., 59 F. (2d) 13; *Phillips v. The Governor & Co.* (1935), 9 Cir., 79 F. (2d) 971. This is likewise the majority rule. See Anno.—Actual competition as necessary element of trademark infringement or unfair competition, 148 A. L. R. 12, 22.

In addition to the above authorities, we need only make brief reference to the California decisions. In *Jackman v. Mau*, supra, in which the plaintiff was a wholesaler and the defendant a retailer, and the parties were admittedly not in competition with each other, the court rejected the contention that there could be no "unfair competition" in the absence of competition. The court said at p. 266:

"* * * While it is true that most of the cases dealing with unfair competition are concerned with instances in which the respective parties are

engaged in business directly competitive, nevertheless, as said in *Academy of Motion Picture Arts & Sciences v. Benson*, supra, at page 689: ‘But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and defendant are engaged in noncompeting businesses.’ The true test is—has the defendant ‘adopted a name which *prima facie* is broad enough in its concept to be mistaken by the ordinary unsuspecting person for the institution created by the incorporators of the plaintiff’.”

In the *Academy* case, supra, which was decided by the Supreme Court of California, the plaintiff was a non-profit corporation organized for the purpose of advancing the art of motion pictures by conferring awards of merit, conducting research, and the like, whereas the defendant operated a school of dramatics. The opinion of the court specifically points out that the “businesses of the parties are not directly competitive”, and that by “*the use of the name Hollywood Motion Picture Academy the defendant does not take away from the plaintiff and draw to herself any business which the plaintiff otherwise would receive*” (pp. 688-689, emphasis ours). Nevertheless, the court held that upon the facts alleged in the complaint the plaintiff was entitled to an injunction “in order to prevent confusion with the institution or society represented by the plaintiff” (p. 691); and the judgment of the trial court sustaining a demurrer to the complaint was reversed.

Likewise, in *Law v. Crist*, supra, in which both parties were non-profit organizations engaged in the teaching and advancement of "theosophy", it was held that the plaintiff was entitled to an injunction against the use of its name by the defendant, despite the fact that the parties were not competing with each other for profit. See also, *Wood v. Peffer*, supra, at pp. 122-123; *Hooper v. Stone* (1921), 54 C. A. 668.

Not only is competition unnecessary, but a review of the pertinent case law discloses that the scope of protection—business-wise and commodity-wise—which the courts have accorded the owner of a trade name or insignia has continuously been expanding. Thus the courts have come to recognize that under modern methods of doing business, in which advertising plays a vital role, there is real danger that a distinctive name or insignia will, unless protected, become associated in the public mind not only with other goods or businesses of the same kind and class, but even with goods or businesses of wholly different kinds and classes. "The issue in each case is whether the goods, services, or businesses of the actor and of the other are sufficiently related so that the alleged infringement would subject the good will and reputation of the other's trade-mark or trade name to the hazards of the actor's business". *Rest., Torts*, vol. 3, p. 599.

In *Yale Electric Corporation v. Robertson*, supra, the counter-claimant was a manufacturer of locks and the plaintiff was a manufacturer of flash-lights and batteries. The question, as stated by the court, was

“whether, in view of the fact that it makes no flash-lights or batteries, it (the counter-claimant) may complain of the plaintiff’s use of its name”. The court’s answer to that question, which has already been quoted above, has served as a guide to many other courts. Quoting again the rule of that case (p. 973):

“* * * And so it has come to be recognized that, unless the borrower’s use is so foreign to the owner’s as to insure against any identification of the two, it is unlawful.”

In *L. E. Waterman Co. v. Gordon* (1934), 2 Cir. 72 F. (2d) 272, the plaintiff was a manufacturer of fountain pens and similar articles under the name “Waterman”, and the defendant was engaged in selling drugs and cosmetics. The defendant commenced to sell razor blades under the name “Waterman”, but was enjoined from making further sales. The court, again speaking through Judge Learned Hand, observed that (p. 273):

“It is now well settled in this country that a trade-mark protects the owner against not only its use upon the articles to which he has applied it, but upon such other goods as might naturally be supposed to come from him. [Citing cases.] There is indeed a limit; the goods on which the supposed infringer puts the mark may be too remote from any that the owner would be likely to make or sell. It would be hard, for example, for the seller of a steam shovel to find ground for complaint in the use of his trade-mark on a lip-stick. But no such difficulty arises here; razor blades are sold very generally by others than

razor blade makers, and might well be added to the repertory of a pen maker. Certainly when the infringement is so wanton, there is no reason to look nicely at the plaintiff's proofs in this regard. On the merits there can therefore be no question that the judge was right."

In *Wall v. Rolls-Royce of America, Inc.*, supra, the plaintiff, Rolls-Royce of America, was a corporation engaged in the business of making and selling automobiles, airplanes, and parts thereof, and its name had "become associated all over the world with the excellence of its product". The defendant, Wall, was engaged in the business of selling radio tubes through the mails, labelled "Rolls-Royce"; and he advertised his business as the "Rolls-Royce Tube Company". In granting an injunction, the court said (p. 334):

"* * * It is true those companies made automobiles and aeroplanes, and Wall sold radio tubes, and no one could think, when he bought a radio tube, he was buying an automobile or an aeroplane. But that is not the test and gist of this case. Electricity is one of the vital elements in automobile and aeroplane construction, and, having built up a trade-name and fame in two articles of which electrical appliances were all important factors, what would more naturally come to the mind of a man with a radio tube in his receiving set, on which was the name 'Rolls-Royce,' with nothing else to indicate its origin, than for him to suppose that the Rolls-Royce Company had extended its high grade of electric product to the new, electric-using radio art as well. And if this Rolls-Royce radio tube proved unsatisfactory, it

would sow in his mind at once an undermining and distrust of the excellence of product which the words 'Rolls-Royce' had hitherto stood for."

In *Dunhill of London, Inc. v. Dunhill Shirt Shop, Inc.* (1929), D. C., S. D. N. Y., 3 F. Supp. 487, the plaintiff was engaged in the business of selling pipes and other smokers' supplies, and the defendant operated a men's haberdashery shop. In granting an injunction, the court, relying upon the *Rolls-Royce* and *Yale Electric* cases, supra, made short shrift of the matter, saying (p. 487), "It is no answer that the defendant sells shirts, and the plaintiff, smokers' requisites."

In *Kroll Bros. v. Rolls-Royce* (1942), C. C. P. A., 126 F. (2d) 495, the appellant was engaged in the business of manufacturing baby carriages and go-carts, and the appellee was a manufacturer of automobiles, and parts thereof, and airplane engines, under the name "Rolls-Royce". The court affirmed a decision of the Commissioner of Patents denying the appellant the right to register the trademark "Krolls-Royce", upon the ground that "confusion as to origin of appellant's goods would be probable" (p. 498).

In *Cartier, Inc. v. Parfums Blanchard, Inc.* (1941), 32 N. Y. S. (2d) 15, the plaintiff was engaged in the jewelry business under the name "Cartier", but it sold, also, such articles as lipstick containers and vanities. The defendant was in the perfumery business under the name "Chartier". A temporary injunction was granted in order to protect the plaintiff and the public "in their right to fair treatment" (p. 16).

In *Socony-Vacuum Oil Co., Inc. v. Lafariere*, supra, the plaintiff was engaged in the business of selling fuel oil under the name "Standard Oil"; and, in addition, it furnished engineering advice regarding the operation of oil burners. It did not, however, repair or service such burners. The defendant was engaged in the business of repairing and servicing oil burners, under the name "Standard Oil Burner Service". In issuing a temporary injunction, the court applied the settled rule that (p. 422):

"Plaintiff * * * is entitled to be protected, not only from direct competition, but from any injury which might result to it from deception to the public through the unauthorized use of its trade-name, or a trade-name which would lead the public to believe that it was in some way connected with plaintiff."

In *Lady Esther, Limited v. Flanzbaum* (1942), D. C., R. I., 44 F. Supp. 666, the plaintiff was engaged in the business of selling cosmetics under the name "Lady Esther", and the defendant operated a retail store under the name "Lady Esther Shoe Store", selling ladies' shoes and stockings. The court held that the defendant's conduct constituted unfair competition, and granted an injunction.

In *Time, Inc. v. Barshay* (1939), D. C., S. D. N. Y., 27 F. Supp. 870, the plaintiff was the publisher of "Time" magazine, and the producer of radio broadcasts and motion pictures under the title "The March of Time". The defendant was engaged in the business of reproducing and selling phonograph records under the name "The Voice of Time". An injunction

was granted upon the theory of unfair competition, as well as for trademark infringement.

In *Golenpaul v. Rosett* (1940), 18 N. Y. S. 889, the plaintiffs were owners of the well-known radio program "Information Please", and the defendants were about to publish a magazine under the same name. The threatened publication was enjoined by the court, with the observation that (pp. 890-891):

"In earlier days it doubtless would have been held that a magazine is in competition with only another magazine and that, therefore, the use by one person of two words so commonplace as 'information' and 'please' to designate either a book or a moving picture or a verbal program carried over the air would not prevent another person from using the same words as the title of a magazine. At the present time, however, the law of 'Unfair Competition' lays stress upon the element of unfairness rather than upon the element of competition and recognizes that where any name or mark or symbol, even though consisting of commonplace words of the English language, has come to signify in the public mind the product of business of a particular individual or group of individuals, such name or mark or symbol cannot be used by another individual or group of individuals, in such way as to lead the public to believe that the product or business of the latter is the product or business of the former. Illustrations of that rule are numerous." (Citing cases.)

In *Esquire, Inc. v. Esquire Bar* (1941), D. C., S. D. Fla., 37 F. Supp. 875, the plaintiff was publisher of

the magazine "Esquire", and the defendant operated "an elaborate and decorative establishment" in Miami, Florida, selling goods, beverages, wines and liquors. The court enjoined the defendant from infringing upon the plaintiff's various trademarks and from using the name "Esquire" in any manner whatever. Upon the theory of unfair competition, the court found that (p. 876):

"* * * the defendant's use of plaintiff's name 'Esquire' is calculated to, and does, cause the public (not otherwise fully informed) to believe there is some connection between the two, either that the plaintiff owns or controls the business of the defendant, or sponsors it, or has given leave to conduct the business under some contract, and that the defendant's business has the approval of plaintiff, or that the defendant's business is in some manner related to the plaintiff's business, Esquire, Inc., and thereby constitutes unfair competition in violation of plaintiff's rights."

In *Great Atlantic & Pacific Tea Co. v. A. & P. Radio Stores* (1937), D. C., E. D. Pa., 20 F. Supp. 703, the plaintiff, owner of a nationally known chain of grocery stores, obtained an injunction restraining the defendant from using the letters "A. & P." in reference to a retail store dealing in new and used radios, washing machines, and electric refrigerators.

Similarly, in *Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers* (1934), D. C., W. D. Pa., 10 F. Supp. 450, the same plaintiff was granted injunctive relief against the operator of a cleaning and dyeing establishment.

In *Bulova Watch Co. v. Stolzberg* (1947), D. C., Mass., 69 F. Supp. 543, the court held that (p. 547):

“* * * Watches and shoes, while non-competing, are not so remote as to foreclose the possibility that they come from the same source. Defendant, by using the trade-mark on low price shoes, stands to injure plaintiff’s reputation and dilute the quality of his trade-mark. Defendant has little cause to complain since he has been riding the coattails of the plaintiff’s good will, and he had available to him a wide range of choice to name his products.”

In *Philadelphia Storage Battery v. Mindlin*, supra, the plaintiff was the manufacturer of radio sets, storage batteries, and similar products under the well-known brand “Philco”, and the defendant was engaged in the business of selling razor blades under the same name. The plaintiff had never made razor blades and there was no evidence that it ever intended to do so. The court, nevertheless, issued an injunction, saying (pp. 178-180):

“* * * But diversion of trade is not the only injury which may be caused by the second use. The normal potential expansion of the plaintiff’s business may be forestalled. * * * His reputation may be tarnished by the use of his mark upon an inferior product. * * * A false impression of a trade connection between the parties may be created, possibly subjecting the plaintiff to liability or to the embarrassments of litigation, or causing injury to his credit and financial standing. * * *”

* * * * *

“The element of the possibility of confusion at source has been stressed in various decisions. The

ambit of protection is constantly being widened. The adoption of 'Kodak' for cameras precludes its use on bicycles * * * ; 'Rolls-Royce,' the name of an automobile, may not be appropriated for radio tubes * * * ; 'Time' as a brand for bicycles may be restrained by the proprietor of a newspaper bearing that name * * * ; 'Waterman' as a mark for razor blades may be interdicted at the suit of the fountain pen company * * * ; the use of 'Dunhill' the famous brand for smokers' supplies, on shirts constitutes an infringement * * * ; the same mark may not be used on liniment and soap * * * ; automobiles and tires * * * ; food products and oleomargarine * * * ; upon electrical appliances and spark plugs * * * ; upon cooking utensils and wash boilers * * * ; or upon mineral oil and figs * * * .'' (Emphasis ours.)

The above cases⁹ indicates the extent to which the courts have gone in granting injunctive relief even though the defendant was engaged in an entirely different kind or class of business. As far as we have discovered, the California courts have not yet been presented a case in which the goods or businesses in-

⁹See also, *Eastman Photo Materials Co. v. Griffiths Cycle Corp.* (1898), 15 R. P. C. 105; *Walton v. Ashton* (1902), 2 Ch. 282; *Armour & Co. v. Master Tire & Rubber Co.* (1925), D. C., S. D. Ohio, 34 F. (2d) 201; *Vogue Co. v. Thompson-Hudson Co.* (1924), 6 Cir., 300 F. 509, cert. den. 273 U. S. 701, 47 S. Ct. 98, 71 L. Ed. 850; *Duro Co. v. Duro Co.* (1928), 3 Cir., 27 F. (2d) 339; *Standard Oil Co. v. California Peach & Fig Growers* (1928), D. C., Del., 28 F. (2d) 283; *California Fruit Growers Exchange et al. v. Sun-kist Baking Co.* (1946), D. C., S. D. Ill., 68 F. Supp. 946; *Ford Motor Co. v. Ford Insecticide Corporation* (1947), D. C., E. D. Mich., 69 F. Supp. 935; *Acme Chemical Co. v. Dobkin* (1946), D. C., W. D. Pa., 68 F. Supp. 601. The latter case contains a lengthy review of pertinent decisions, including many which are not cited in this brief.

volved were as different in nature as these which have confronted other courts, but there is strong indication in the California cases that the state courts would not decline to follow the general trend of authority.

In *Academy of Motion Picture Arts & Sciences v. Benson*, supra, the parties were, of course, non-competitive, and, also, they were engaged in different enterprises; but in that case, which arose upon a demurrer to the complaint, there were allegations to the effect that the defendant "has induced certain persons and prospective students in particular into believing that her school was being conducted by or in connection with the plaintiff and that persons trained in the defendant's school had received or would receive 'Academy Awards' for meritorious performances" (pp. 687-688).

In *Jackman v. Mau*, supra, in which the parties likewise were not in competition with each other, one of them being a manufacturer and the other a retailer, they were nevertheless engaged in handling the same general class of merchandise.

It is to be noted, however, that the California courts have cited and quoted decisions, such as the *Yale Electric* case, in which the courts have protected trade names and insignias from use in connection with different goods or classes of business. Moreover, the California courts, as we have already indicated, have accepted and followed the "confusion of source" concept as the guiding principle in this field of the law. See, for example, *Eastern-Columbia, Inc. v. Wald-*

man, supra, note 6; *Winfield v. Charles*, supra; *Jackman v. Mau*, supra; *Physicians Electric Service Corp. v. Adams*, supra; *Academy of Motion Picture Arts & Sciences v. Benson*, supra; *Law v. Crist*, supra; *Carolina Pines v. Catalina Pines*, supra; *Evans v. Shockley*, supra; *Wood v. Peffer*, supra.

In light of the above authorities, the present case presents no problem. Here the parties were engaged in the same general class of business. They were both in the business of dispensing food, beverages, and entertainment. And while the appellees' business was on a smaller scale than that of the appellant, injunctive relief will not be denied merely because the businesses are different in size. *Cluett, Peabody & Co. v. Spetalink* (1938), D. C., E. D. N. Y., 29 F. Supp. 173. In that case the plaintiff, owner of the nationally known tradename and trademark "Arrow", as used in connection with men's shirts, neckties, and the like, obtained an injunction against a defendant whose operation was relatively so trivial that he "has no place of business but operates solely from his home and does not even have a telephone number" (p. 174). The court found that there was both infringement and unfair competition.

Similarly, in *Garcia v. Garcia* (1912), D. C., E. D. Wis., 197 F. 637, the court held that "the defendant's claim that his annual product is so small as not to make him a competitor of the complainants cannot be urged as supporting a right to use complainants' valuable trade-names as a means, possibly to extend

his business (p. 641). As said in *Callman*, supra, at p. 1238, "A defense that the defendant's annual production is too small to place him in competition with the plaintiff is hardly deserving of serious consideration." See also, *Acme Chemical Co. v. Dobkin*, supra, note 9, at p. 613; *Hall v. Holstrom*, supra, at p. 570.

Furthermore, the possibility that the appellees' business might appeal to a wider class of patronage than that of the appellant would not afford a sufficient basis for denying injunctive relief. In *Brooks Bros. v. Brooks Clothing of California*, supra, the defendant sought to draw "a differentiation between the businesses based upon the dissimilarity of the merchandise of the two parties and its 'appeal' to the different social groups from which they seek custom" (p. 451). The argument was flatly rejected by the court in the following language (pp. 453-454):

"You cannot divide the clothing business into categories, according to the social group on which it may depend for patronage * * * 'Pigs is pigs' * * * Ours is an unstratified society with constant mobility of persons. Absent a 'caste' system, there can be no 'caste' in merchandising * * * ."

And even assuming, finally, that the appellees' business was in a different class from that of the appellant, such fact, as we have already shown, would not preclude injunctive relief. If the purchaser of a "Rolls-Royce" radio tube would likely believe that there was some connection between its producer and a manufacturer of "Rolls-Royce" automobiles; or if the patron of an "Esquire" restaurant in Miami,

Florida, would likely believe that such business was in some way associated with the magazine of the same name; or if there is a sufficient relationship to support a likelihood of confusion as between smoking equipment and shirts, between jewelry and perfumes, between go-carts and automobiles, between cosmetics and shoes, between watches and shoes, between a radio program and a magazine, between fountain pens and razor blades, between radios and razor blades, and so on; then it would seem too clear for argument that a person patronizing or dealing with the "Stork Club" in San Francisco would likely believe that it was in some way associated or connected with, or sponsored or approved by, "The Stork Club" in New York. Especially is this true in an age of chain operations and mass distribution, where, as a matter of common knowledge, names and marks of national prominence are frequently used, through licensing and otherwise, in reference to widely different classes of goods or businesses.

Moreover, we must not lose sight of the fact that the relationship between the appellees' business and that of the appellant is merely one aspect of the central issue of confusion. Considering the fact that the appellant's trade name and insignia are highly distinctive and have acquired a unique significance in the public mind; that the appellees adopted and used both a name and an insignia so strikingly similar to, or not identical with, the appellant's designations that the public would immediately tend to associate their business with the appellant's; that the appellees them-

selves presumably believed that their business was sufficiently similar to the appellant's that they would profit by using the appellant's name and insignia; and that the two businesses were both engaged in supplying the public with food, beverages, and entertainment; then it cannot fairly be said that the likelihood, if not certainty, of confusion thus established is completely overcome and eliminated by the minor differences existing between the appellees' business and that of the appellant.

Certainly it cannot be said in this case that the appellees' use "is so foreign to the owner's as to insure against any identification of the two" (*Yale Electric Corporation v. Robertson*, supra, at p. 973). The appellant, therefore, is entitled to protection against the hazards created by the use of its trade name and insignia in reference to the appellees' business.

7. The appellant's trade name and insignia are entitled to protection in the California market area.

With a likelihood of confusion thus established, the appellant's right to injunctive relief would seem to be unaffected by the mere fact that its place of business was located in New York and the appellees' business in San Francisco. In finding that there was no likelihood of confusion, however, the trial court appears to have been influenced by the fact that "plaintiff does not have and is not interested in any place of business within the State of California" (Tr. 40). But the location of the appellant's *place* of business, as we shall show, is not the dispositive factor.

Preliminarily, it should be noted that there is no *à priori* territorial limitation to the relief which will be granted in a case of this nature, but, as has previously been indicated, the geographical relationship between the appellees' business and that of the appellant is merely a factor to be considered in connection with the ultimate issue of confusion.

It is now well established in the case law that there may be a likelihood of confusion even though the business establishments themselves are far removed from each other. In numerous cases, as we shall see, the plaintiff's place of business was far distant from the defendant's, and in some instances it was located in a foreign country; yet the courts granted injunctive relief. The question, therefore, is not whether the plaintiff maintains a *place* of business in the area of the defendant's operation, but whether the plaintiff *draws* business, or may reasonably expect to obtain business, from that area.

Thus, the rule of law applicable to this phase of the case is that the appellant is entitled to protection with reference to the territory "from which he receives or, with the probable expansion of his business, may reasonably expect to receive custom in the business in which he uses his trademark or trade name, and in territory in which a similar designation is used for the purpose of forestalling the expansion of his business." *Rest., Torts*, vol. 3, sec. 732, p. 604.

The rationale of this rule is that "If the trademark or trade name is unknown in a particular territory and there is no probability that it will become

known there, the use of a similar designation in that territory will cause no harm to the person having the trade-mark or trade name, since it cannot lead to mistaken association with that person. Such might be the case of the trade name of a grocery store in a small city in northern New York and a similar designation used for a grocery store in Brooklyn, N. Y. On the other hand, a large department store in New York City might draw trade not only from the entire State of New York but even from distant States, either by mail or *through the personal shopping of frequent non-resident visitors*” (*Rest., Torts, supra*, pp. 604-605; emphasis ours).

Analysis of the court decisions readily reveals that the above-mentioned rule is truly a “restatement” of the law, not only in general, but in California as well. Before reviewing the pertinent decisions, however, brief reference should be made to the *Hanover*¹⁰ and *Rectanus*¹¹ cases, which are considered landmarks in this field of the law despite the fact that they involved unusual factual situations.

In the *Hanover* case, the Supreme Court held that the Hanover Milling Co., which sold flour in Alabama and neighboring states, under the trade-mark “Tea Rose”, was entitled to an injunction restraining Metcalf, a junior appropriator, from using such trade-mark in Alabama; but that Allen and Wheeler, which

¹⁰*Hanover Star Milling Co. v. Metcalf, and Allen & Wheeler Co. v. Hanover Star Milling Co.* (1916), 240 U. S. 403, 36 S. Ct. 357, 60 L. Ed. 713.

¹¹*United Drug Co. v. Rectanus Co.* (1918), 248 U. S. 90, 39 S. Ct. 48, 63 L. Ed. 141.

had never used the trade-mark "Tea Rose" in the southeastern states, was not entitled to restrain Hanover, its junior appropriator, from using such trade-mark in those states. The court's reasons for refusing to enjoin Hanover were (1) that it had adopted the name "Tea Rose" in good faith and without knowledge of the prior use by Allen & Wheeler, and (2) that the latter had never sold flour in the area occupied by Hanover and was not even known in that area. As the court said, "where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote from the other, the question of prior appropriation is legally insignificant"; but the court added the now famous exception—"unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like" (p. 415). The court observed further that it was "not dealing with a case where the junior appropriator of a trademark is occupying territory that would probably be reached by the prior user in the natural expansion of his trade, and need pass no judgment upon such a case" (p. 420). But it confirmed the established rule that "Into whatever markets the use of a trademark has extended, or its meaning has become known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress" (pp. 415-416).

In the *Rectanus* case, the court was confronted with a situation similar to that presented in the *Hanover* case, "where the same trademark happens to be employed simultaneously by two manufacturers in different markets separate and remote from each other, so that the mark means one thing in one market, an entirely different thing in another" (p. 100). Accordingly, an injunction was denied.

As the Supreme Court itself observed in the *Hanover* case, "The case is peculiar in its facts; and we have found none precisely like it" (p. 420). The truth of that observation is plainly evident from the fact that in subsequent cases the courts have repeatedly characterized the *Hanover* and *Rectanus* cases as "exceptional"; and the so-called exceptions recognized in those cases have now become the general rule. Such cases are obviously distinguishable on their facts from the present case. Here, the appellees not only invaded a market area already occupied by the appellant, but they did so with knowledge of the appellant's prior use of its trade name and insignia.

In *Brooks Bros. v. Brooks Clothing of California*, supra, the plaintiff was a retailer of men's clothing with its principal place of business in New York City, and the defendant was engaged in a similar business under a similar name in California. The defendant commenced its business in 1924. The plaintiff, as early as 1850, "advertised goods for the California trade. It conducted, at first, sales through the mails, and from the year, 1930, through representatives, who

each year called on a selected California clientele, after announcement of the representative's coming was made through personal notice and advertisements in the newspapers. In 1939, it established sales agencies in Los Angeles and San Francisco" (p. 446).

Thus, at the time the defendant entered the field in California, in 1924, the plaintiff's business in that state was confined to the mails, and it was not until 1930, or six years after the defendant started using its name, that the plaintiff commenced to send solicitors into the state. And not until 1939 did it set up its sales agencies in Los Angeles and San Francisco.

The court held, nevertheless, that the plaintiff had established a special significance or secondary meaning in its name in California, and rejected the contention that "because the defendant, beginning in 1924, operated stores in California and used 'Brooks' in its business name, it acquired priority in the local market" (p. 461). Such an argument, said the court, "might apply to one who came later. But 'Brooks Brothers' were first in the California trade long before that date." Finding that there was "both trademark infringement and unfair competition" (p. 462), the court enjoined the defendant from using the name "Brooks".

In *R. H. Macy & Co. v. Macy's, Inc.* (1930), D. C., N. D. Okla., 39 F. (2d) 186, the plaintiff was the owner of "Macy's", the nationally known department store located in New York City, and the defendant opened a store under the same name in Tulsa, Okla-

homa. It appeared that the plaintiff had for a number of years shipped goods into Oklahoma and was known in that state as "Macy's". The court rejected the defendant's claim that "plaintiff's business did not extend into Oklahoma" (p. 187), and held that the plaintiff was entitled to an injunction.

Likewise, in *R. H. Macy & Co. v. Colorado Clothing Mfg. Co.* (1934), 10 Cir., 68 F. (2d) 690, "Macy's" obtained an injunction against a manufacturer of men's clothing operating under a similar name in Denver, Colorado. The court said (p. 692):

"We cannot escape the conclusion that to the Macy Company's customers in the states west of the Mississippi river the name has come to have a secondary meaning. If such be true, the Colorado Company had no right to use the name in any way that would be likely to confuse and deceive the purchasing public. *Hygrade Food Products Corp. v. H. D. Lee Mercantile Co.* (C. C. A. 10) 46 F. (2d) 771, 772.

Furthermore, the word Macy, being a part of the Macy Company's corporate name, not only identifies its merchandise, but the corporation itself. Persons having business relations with the Macy Company, upon learning of the 'Macy Tailoring System of America,' might well believe that the Macy Company had established a Denver branch and was engaged in selling a one-price, lowgrade line of clothing, and the business practices of the Colorado Company might reflect upon the business and corporate reputation of the Macy Company. This is an additional reason why the Macy Company was entitled to relief.

Standard Oil Co. of New Mex. v. Standard Oil Co. of Calif., supra.”

Also, in *R. H. Macy & Co. v. Macy's Drug Store*, (1936), 3 Cir., 84 F. (2d) 387, an injunction was issued restraining a drug store in Philadelphia from using the name “Macy’s”.

In *Sweet Sixteen Co. v. Sweet “16” Shop* (1926), 8 Cir., 15 F. (2d) 920, the plaintiff operated a chain of five stores, located in San Francisco, Los Angeles, Portland, and Seattle, dealing in women’s apparel, under the name “Sweet Sixteen Company”. The defendants opened a similar store in Salt Lake City under the name “Sweet ‘16’ Shop, Inc.” Prior to that time the plaintiff, in the language of the court, “had sent some 1,500 of its catalogues into Utah and to Salt Lake City; in 1922 it supplemented its catalogues by sending into that state pictures and drawings of many of the goods kept and sold by it; **and it** had sold to citizens of Utah at Salt Lake City some goods and had filled some mail orders there; in all, making some six or eight sales in one or the other of the above ways. Newspapers containing its advertisements had constantly been sold in Salt Lake City for a number of years before defendants did the act here complained of. Plaintiff avers, and the evidence discloses, its intention to establish a store in Utah, and to this end it had already taken tentative steps till the acts of the defendants forestalled it.”

Upon these facts the court held that by “prior appropriation of the field of trade”, and by “the right

to a natural expansion into such field", the plaintiff was entitled to an injunction restraining the defendants from using its trade name in Utah.

In *Phillips v. The Governor & Co.*, supra, the plaintiff, commonly known as "Hudson's Bay Company", operated about 300 retail stores and trading posts in Canada, but had no such outlets in the United States, although it did sell blankets, tobacco, and tea through jobbers in the United States. The defendant operated a retail store in Reno, Nevada, under the name "Hudson Bay Fur Co." The court held that the plaintiff was entitled to an injunction, upon the theory of unfair competition, restraining the defendant from using its trade name.

Likewise, in *Buckspan v. Hudson's Bay Co.*, supra, the plaintiff, "Hudson's Bay Company", obtained an injunction against a retailer of furs operating in Dallas, Texas, under a similar name. The evidence showed that the plaintiff had no place of business in the United States, although blankets and tobacco bearing its trade-mark were sold by retail stores in the United States and in Dallas, as were fur garments made from pelts purchased from the plaintiff at auction sales in London. The court distinguished the *Hanover* and *Rectanus* cases, and held (p. 723):

"We are not of opinion that appellee's right to relief was affected by the fact that prior to the institution of the suit it had not been a wholesale or retail seller of furs in Dallas or elsewhere in the United States. It was enough to entitle the appellee to relief that its furs and other products

marketed by it were known and dealt in in Dallas and throughout the United States, that the use by appellant of a trade-name having a deceptive similarity to that of the appellee enabled the appellant to sell his furs as those of the appellee, thereby deceiving the public, and at least in appellant's limited trade territory, making the maintenance of appellant's good name and good will and the reputation of its furs dependent to some extent upon appellant's conduct and financial responsibility and the quality of the furs sold by him." (Citing cases.)

Again, in *The Governor & Co. v. Hudson Bay Fur Co.* (1928), D. C., Minn., 33 F. (2d) 801, the "Hudson's Bay Company" was granted an injunction against a dealer in furs and blankets doing business under a similar name in Duluth, Minnesota. The court observed that (p. 802):

"* * * The mere fact that in a particular place a plaintiff, which is a well and favorably **known** trading concern, does not actually have an established place of business, will not justify another in knowingly and in bad faith adopting the name of, and thereby holding himself out as, such plaintiff, or as connected therewith, and seek to profit by inducing the public to purchase his wares through the practice of such deception. *A trading concern may have a well-earned and well-established reputation in a place where it has no established business location*" (emphasis ours.)

Later, the court cautioned that "A deliberate attempt to deceive, however, is not a necessary element of such cases" (p. 803).

In *Horlick's Malted Milk Corp. v. Horluck's*, supra, the plaintiff was the manufacturer of "Horlick's Malted Milk", which it sold in powdered form to retailers throughout the United States, and its name had come to signify the plaintiff's product and no other. The defendant corporation, the founders of which were named "Horluck", developed a chain of sandwich shops in the state of Washington, operating under the name "Horluck's Specialty Malted Milk Shops", at which it sold various food items including malted milk beverages. In making such beverages the defendant did not use the plaintiff's brand of dry malted milk. The court enjoined the defendant from using the name "Horluck's Malted Milk" in reference to its business and from using "Horluck's" or "Horlucks", in the possessive form, in advertising its malted milk, upon the ground that such uses constituted unfair competition.

In *Maison Prunier v. Prunier's Restaurant & Cafe* (1936), 159 Misc. 551, 288 N. Y. S. 529, the plaintiff operated two restaurants in Paris and one in London under the name "Maison Prunier", and the name had acquired a "world-wide reputation". In addition, the plaintiff had the intention of establishing another restaurant in New York City "at an expedient time" (p. 531). The defendants opened a similar restaurant in New York and deliberately appropriated the plaintiff's name in order to profit by its goodwill and reputation. It was their contention that "the plaintiff has no right to protection against the use of a trade-mark or trade name beyond the territory in which it oper-

ates'' (p. 535). In rejecting this argument and granting a temporary injunction, the court pointed out that the case fell within the so-called exceptions to the *Hanover* and *Rectanus* cases, and held that ''If the plaintiff as the result of its efforts has become well known in New York City, the facts may be shown at the trial'' (p. 537). The court observed further that (p. 535):

''* * * it may be suggested whether in these days of rapid and constant intercommunication between states and nations any narrow lines of demarcation should be established on one side of which should stand moral wrong with legal liability, and upon the other moral wrong with legal immunity''.

In *White Tower System v. White Castle System* (1937), 6 Cir., 90 F. (2d) 67, both parties operated hamburger stands in Detroit, employing similar names and advertising slogans, and using similar structures designed like miniature castles. Although the ''White Tower'' was first to establish a place of business in Detroit, the trial court found that the ''White Castle's'' ''food products, trade name, slogan, and style of building were known in Detroit and to the purchasing public of that city before appellant located there, and that Detroit was at that time within the normal scope of expansion of appellee's business, and that appellee then had substantial good will in that city''. This finding was based upon evidence that White Castle ''advertised in various newspapers, trade journals and over the radio, and also upon the testi-

mony of residents of Detroit who had known of the White Castle lunchrooms prior to the opening of the White Tower stands”.

In affirming the above finding, and the trial court’s injunction against the White Tower, the appellate court said:

“* * * We cannot ignore the fact that appellee established its stands along arterial highways, with the result that the traveling public carried its reputation to far distant points, and by personal recommendation its good name became an asset in Detroit. Good will may be defined as the favorable consideration shown by the purchasing public to goods known to emanate from a particular source. While its existence may be shown by proof of actual successful operation, it may also be shown by proof of the reputation which arises from such operation. *It may exist in territory where no business is done by the possessor of the good will*” (emphasis ours).

In *Brass Rail v. Ye Brass Rail of Massachusetts* (1938), D. C. Mass., 43 F. Supp. 671, the plaintiff operated a restaurant and bar, called “The Brass Rail”, in New York City. It had become “somewhat national in its reputation” and was “well known” in Boston, where the defendant conducted a similar business. The court found that there was a likelihood of confusion and a “possible, danger to reputation and credit” of the plaintiff, and, accordingly, issued an injunction restraining the defendant from using the name “Brass Rail”.

In *Bill's Gay Nineties v. Fisher* (1943), 41 N. Y. S. (2d) 234, the plaintiff operated a restaurant and night club called "Gay Nineties", in the Borough of Manhattan, New York, and the defendant opened a similar establishment under the same name in Brooklyn. While the two businesses were thus quite close to each other, and the court did not hesitate to grant the plaintiff an injunction, it appears from the opinion that the court would have enjoined the defendant even if her place of business had been far distant from the plaintiff's. The opinion points out that the plaintiff's "good will and reputation have been evidenced by hundreds of articles and notices appearing in magazines, newspapers and other publications widely distributed in New York City and elsewhere" (p. 235); that its business was further fostered by a radio program with nation-wide reception, and that "'Gay Nineties' as thus exploited and publicized has come to have a secondary meaning and to be identified in the mind of the public with the restaurant and night club of petitioner, located in the Borough of Manhattan" (p. 236). The court held:

"Nothing seems more firmly grounded today than, distance is no defense. Injunctive relief has frequently been afforded to protect restaurants and hotels although the respective establishments were distantly removed from each other. *Maison Prunier v. Pruniers Restaurant & Cafe*, 159 Misc. 551, 288 N. Y. S. 529; *Brass Rail, Inc. v. Ye Brass Rail of Mass., D. C.*, 43 F. Supp. 671; *Marsh v. Billings*, 7 Cush., Mass., 322, 54 Am. Dec. 723;

Howard v. Henriques, 5 Super. N. Y. Ct. 725, 3 Sandf. 725.

“At any rate a merchant’s protection should at least be coextensive with his market. Nims, sec. 104.”

Finally in *Stork Restaurant, Inc. v. Marcus* supra, the plaintiff (same party as the appellant here) obtained an injunction restraining the use of its trade name and insignia in reference to a similar establishment in Philadelphia. After pointing out that the likelihood of confusion is not confined to cases in which the parties are competing with each other, the court said (p. 94):

“Though there has been shown but slight confusion, it requires nothing but comparison of the names, insignia and fundamental character of business done to demonstrate that there is a likelihood of future confusion. Whether the defendant’s business will continue to differ as it now does from that of the plaintiff can only be conjectured. Whether the now patent difference will effect a depreciation of the value of the plaintiff’s name and insignia is even more conjectural. *But, I am decided that there exists a threat, if not a promise, of growing confusion to the detriment of the plaintiff’s reputation in an area from which its patrons are in part drawn.*

This latter conclusion must, of course, be tempered by an admission that the forseen confusion, if it occurs, will not damage the reputation ‘at large’ of the plaintiff. That is, any injury done to the plaintiff’s reputation will be confined to a

geographically and numerically small proportion of the plaintiff's public. However, this admission does not constrain me to view the defendant's transgressions as within the rule of *de minimis non curat lex*. In fact, reflection clarifies the possible, perhaps probable effects of licensing such an usurpation of reputation as here confronts me. *Upon the strength of a single, if sustained, precedent the plaintiff could be literally 'hemmed in' by 'Stork Clubs', until the public was so surfeited with the same that the mere mention of the name would provoke contrary reactions * * **" (emphasis ours).

Turning now to the California cases, it appears that in most of them the plaintiff maintained a place of business within the state; hence the cases, for the most part, do not involve large orbits of protection with reference to the location of the plaintiff's business establishment.¹² Nonetheless, the state court decisions leave no doubt that the law in California is in accord with the general rules established in the above-mentioned cases.

Thus, in *Derringer v. Plate* (1865), 29 C. 292, the plaintiff was the manufacturer of "Derringer" pistols, with his place of business in Philadelphia, and the defendant was engaged in the manufacture of pistols in San Francisco. The plaintiff sought an

¹²"Most unfair competition litigation takes place in the United States courts, because the parties are apt to be citizens of different states." Chafee, *Unfair Competition* (1940), 53 *Harv. L. Rev.* 1289, 1299. This observation is borne out by the fact that numerous cases in this field have reached our own Ninth Circuit Court of Appeals.

injunction to restrain the defendant from using his trademark "Derringer, Philadel." The trial court sustained a demurrer to the complaint, but this ruling was reversed by the Supreme Court of California, which held that the plaintiff had an exclusive property right in his trademark, and that (p. 295):

" * * The right is not limited in its enjoyment by territorial bounds * * * the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs. The manufacturer at Philadelphia who has adopted and uses a trade mark, has the same right of property in it at New York or San Francisco that he has at his place of manufacture"* (emphasis ours).

In *Evans v. Shockley*, supra, the plaintiffs operated tea rooms in New York, Boston, Syracuse, and Newport, Rhode Island, under the name "Mary Elizabeth's", and as a part of their business they shipped confections and pastries to "various parts of the country, including California". Such tea rooms and products had acquired "a wide reputation in this country and abroad". In addition, the plaintiffs had received an assignment of the name "Mary Elizabeth Tea Room" from a concern in Los Angeles which has registered the name with the Secretary of State. Upon objection of the plaintiffs the latter concern had ceased doing business.

The defendant operated a tea room in San Francisco under the name "Mary Elizabeth of San Francisco". The District Court of Appeals held that the

plaintiffs were entitled to an injunction upon the ground that they had acquired, by virtue of the assignment from the Los Angeles concern, an exclusive property right in the name, which the defendant had "invaded". Accordingly, the court found that it was "unnecessary to discuss the question of unfair competition".

A petition to have the cause heard by the state Supreme Court was denied, but the court, in denying the petition, rendered an opinion (58 C. A. 432) affirming the injunction upon the ground that it was "sufficiently supported by the showing made in the trial court in support of the claim of unfair competition". In its opinion, the Supreme Court stated that "we do not at this time either approve or disapprove that portion of the opinion which holds that a registered trademark or trade name can be lawfully transferred so as to separate it from the business or commodity to which it pertains". The Supreme Court thus approved, upon the theory of unfair competition, the issuance of an injunction in favor of plaintiffs whose business establishments were located entirely on the east coast.

In *Benioff v. Benioff* (1923), 64 C. A. 745, the plaintiffs operated a wholesale and retail fur business under the name "Hudson Bay Fur Company", with stores in San Francisco and Oakland, and the defendants were about to commence a similar business under the same name in Los Angeles. The plaintiffs' business was extensively advertised in newspapers

“chiefly in San Francisco and Oakland” (p. 746). In addition, circulars and catalogues, soliciting mail order business, were mailed throughout the state “as far south as Bakersfield, but no attempt was made to advertise locally in Los Angeles” (p. 746). As a result of such advertising, sales were made “to people both north and south of San Francisco, including Los Angeles and points south thereof” (p. 746), and a portion of such sales were made through the mails. The plaintiffs at one time had investigated the possibility of opening a store in Los Angeles.

The trial court found that the plaintiffs’ business was “known to all persons dealing with them and throughout the whole of the state of California as the Hudson Bay Fur Company”, and that their business “extends over the whole of the state of California” (p. 747). An injunction was granted, and on appeal the decision was affirmed, the court saying (p. 748):

“* * * In the interest of fair dealing, courts of equity will protect the person first in the field doing business under a given name to the extent necessary to prevent deceit and fraud upon his business and upon the public * * *; and this true even though, as in this case, the principal places of business are at a considerable distance from each other.”

In *Hall v. Holstrom*, *supra*, plaintiff operated three restaurants in Los Angeles under the name “The White Spot”, and the defendant opened a restaurant in Riverside under the same name. The trial court

denied injunctive relief, but the appellate court reversed the judgment, upon the ground that the plaintiff had an exclusive property right in his trade name. The court declared that (pp. 569-570):

“The appropriation of the exclusive use and registration of a suitable name, sign, design or symbol indicating the ownership of a business, although it may be operated in various units and in remotely separated cities or localities, may not be questioned. Thus it is not open to controversy that the registration or exclusive appropriation of such terms as ‘Piggly-Wiggly,’ ‘Cash and Carry,’ ‘Anna-May Tea Room,’ ‘Pig’n Whistle,’ ‘Silver Slipper Cafe,’ ‘Blue Bird Cafeteria,’ ‘Tait’s Tavern’ ‘Hudson Bay Fur Co.,’ and ‘Philadelphia Shoe Co.,’ as an indication of the owner’s place of business, will be protected by equity. *This is true, although the owners may operate a chain of similarly named restaurants or stores at various and remote places.* [Emphasis ours]. (24 Cal. Jur. 624, sec. 12; *Benioff v. Benioff*, 64 Cal. App. 745 (222 Pac. 835).) With respect to the protection of a trademark or name, section 3199 of the Political Code provides that:

‘Any person who has first adopted and used a trade-mark or name, *whether within or beyond the limits of this state*, is its original owner. Such ownership may be transferred in the same manner as personal property, and is entitled to the same protection by suits at law.’

There is, therefore, no reason why the name or design of ‘The White Spot,’ as the same was used and duly registered to designate the plaintiff’s ownership of his several restaurants, may

not be protected from infringement by injunctive relief, even though a similar business is operated by the defendant under the same name and design at Riverside which is forty miles distant from the city of Los Angeles where plaintiff's restaurants are located."

It is to be noted that the statute quoted by the court, section 3199 of the Political Code, is in substance still in effect, although it is now to be found in the Business and Professions Code. See sections 14400-14401 thereof. This statute will again be referred to later in the brief.

As has often been said, the area of protection is constantly expanding. As *Callman* says (p. 993), "Decisions of twenty years vintage proceeded on the assumption that 'with respect to the usual area of sale and distribution' a retail store, an ice cream manufacturer, a movie theatre, or a motor car service had trade circles limited to a radius of fifty or seventy miles. These cases have been widely and properly criticized, and they are probably anachronisms today."

The decisions reviewed above recognize the fact that "Modern progress in transportation and communication defies boundaries and renders static legal concepts obsolete. The Southerner who visits the North, it has been said, 'returns home and sings the praises of the article to his friends'; and thus he indirectly opens a potential market at a point far distant from that directly solicited by the manufacturer. This is more the rule than the exception. A

newspaper with nation-wide circulation spreads the fame of the mark by its advertisements. And to gourmets the world over, the name of a particular restaurant may become internationally famous without the aid of newspaper and radio." *Callman*, supra, p. 992. As the court said in the *Prunier* case, supra (p. 535), "it may be suggested whether in these days of rapid and constant intercommunication between states and nations any narrow lines of demarcation should be established on one side of which should stand moral wrong with legal liability, and upon the other moral wrong with legal immunity."

It is evident from the above cases that the courts, in California as well as elsewhere, will freely grant injunctive relief to protect trade names and insignias which, like those of the appellant, have acquired a widespread reputation; that such protection will be afforded regardless of whether the plaintiff has a place of business in the area of the defendant's operation, and regardless of whether the plaintiff deals in goods or services, or both; and that such protection will extend not only to areas from which the plaintiff draws custom, but likewise to areas from which, as a result of his good will and reputation, he may reasonably expect to receive custom.

The authorities go even further. They indicate that in some cases the plaintiff will be protected even beyond his zone of good will and reputation—that his protection will extend to the zone of "potential expansion." *Rest., Torts*, vol. 3, sec. 732, p. 604; *Callman*, supra, p. 993 ff. In the present case, however,

we are not concerned with this outer zone of protection; we are here concerned with an area which is not only a zone of good will, but is likewise an important sector of the appellant's market area, from which it already draws valued patronage and custom.

As we have already shown, the appellant's trade name and insignia have attained a national—in fact, an international—reputation, and its business is conducted on a corresponding scale. It actually draws patronage, and the trial court so found (Tr. 41) from all over the United States, including California and the metropolitan area of San Francisco. In evidence, for example, are numerous sample caption sheets and newspaper clippings containing photographs of persons from California and the San Francisco Bay area who have patronized the New York Stork Club from time to time. See above Summary of Evidence, under heading “Nature and Extent of the Appellant's Business and Reputation.” At least seventy percent of the appellant's business is drawn from areas outside New York, and most of the New York City business consists of celebrities who “come in every night, which makes us sort of a show for the out of town people” (Tr. 168-169).

The nation-wide scope of the appellant's business has resulted from its vast advertising and promotional activities which are expressly designed to achieve such a result. Through such media as gifts and souvenirs, newspapers, radio, books, magazines, motion pictures, and the mails, it has thus established not only a national zone of good will and reputation,

but also a national patronage area. And not only does it presently draw custom from the state of California, but it strives to increase its patronage from this state (Tr. 169).

The appellant occupies the field. In such case there would seem to be no doubt as to its right to injunctive relief, since, as was said in the *Gay Nineties* case, supra (p. 236), "At any rate a merchant's protection should at least be coextensive with his market."

8. The trial court's finding that there was no likelihood of confusion is clearly erroneous.

As to the findings on the issue of confusion, it should again be observed that there is no conflict in the evidence. Therefore, the question whether there was a likelihood of confusion in this case is essentially a matter of law.¹³ In the language of the Supreme Court, "The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts." (*Helvering v. Tex-Penn Oil Co.* (1937), 300 U. S. 481, 491, 81 L. Ed. 755, 57 S. Ct. 569. Even treating the trial court's finding on the issue of confusion (Tr. 39-40, 42-43) as an ultimate fact rather than a conclusion of law, such finding, in light of

¹³As said by the Supreme Court of California in *Eastern Columbia, Inc. v. Waldman*, supra, note 6, at p. 274, "Whether a permanent injunction should issue becomes a question of law where the ultimate facts are undisputed and in such case the appellate court may determine the issue without regard to the conclusion of the trial court. (*Thompson v. Moore Drydock Co.*, 27 Cal. (2d) 595; *Richards v. Dower*, 64 Cal. 62; *Isert v. Riecks*, 195 Cal. 569; *Carolina Pines, Inc. v. Catalina Pines*, 128 Cal. App. 84.)"

the undisputed evidence on the subject, was "induced by an erroneous view of the law", hence it is "clearly erroneous". *Aetna Life Ins. Co. v. Kepler*, supra. See also, *Sanders v. Leech*, supra; *United States v. Still*, supra; *Campana Corporation v. Harrison*, supra.

In certain respects the findings appear to be inconsistent in themselves. For example, the court found, as we have previously indicated, that the "plaintiff's 'The Stork Club' has acquired a widespread and valuable reputation" and that it "has commanded and now commands patronage * * * from throughout the United States * * * including the metropolitan area of San Francisco, California" (Tr. 41); yet it found, also, that "the plaintiff's trade name 'The Stork Club' has no value in the State of California" (Tr. 39). The latter finding is not only in conflict with the former, but is completely contrary to the undisputed evidence.

The finding that the appellant's trade name has no value in California, considered in light of the further finding, referred to previously in the brief, that the "plaintiff does not have and is not interested in any place of business within the State of California" (Tr. 40), indicates that the court was under the erroneous impression that the appellant was not entitled to injunctive relief in California for the reason that it had no business establishment within the state. Such a view, as we have shown above, is unsound in principle and is contrary to the case law, in general as well as in California.

The finding that the appellant's trade and patronage has "steadily and materially increased yearly" (Tr. 43), while true, is completely irrelevant and may be dismissed as surplusage. The appellant was not required to prove actual or monetary damage, much less that it suffered an over-all decline in revenue.

The refusal of the court to make any finding as to the appellees' wilfulness and bad faith in appropriating the appellant's trade designations, although request for such a finding was made (Tr. 30), indicates, as we have shown, that the court failed to attribute the proper legal effect to the evidence in this regard.

On the issue of confusion in general, the undisputed evidence in this case shows (1) that the appellant was first in the field with a trade name and related insignia which are highly unique, arbitrary, and fanciful; (2) that this name and insignia have acquired, as the result of an extensive advertising and promotional campaign conducted for a period of more than ten years with the expenditure of hundreds of thousands of dollars, a nation-wide reputation as signifying the appellant's cafe and night club in New York; (3) that the appellant draws patronage and custom from all parts of the United States, including California and the San Francisco metropolitan area; (4) that the appellees have adopted and are now using both a trade name and an insignia which are confusingly similar to, if not identical with, the appellant's distinctive and valuable trade designations; (5) that such acts on the part of the

appellees were for the sole purpose of trading upon the appellant's good will and reputation and thereby attracting patronage to their place of business by inducing prospective customers to believe that there was some connection between such business and that of the appellant, or that such business was sponsored or approved by the appellant; (6) that the appellees' business is in the same general class as that of the appellant and is sufficiently related to the appellant's business to create a likelihood of confusion; (7) that the appellant was entitled to the protection of its valuable trade designations in the state of California; and (8) that upon the entire record, and as a matter of law, there is a likelihood, if not certainty, of confusion, the conduct of the appellees constituted unfair competition, and the appellant is, therefore, entitled to an injunction.

III. THE APPELLANT IS ENTITLED TO AN INJUNCTION UPON THE THEORY OF DAMAGE TO A PROPERTY RIGHT.

The conduct of the appellees not only amounts to unfair competition, but it constitutes, also, an unlawful invasion of the appellant's property rights in its trade name and insignia, and causes or threatens to cause irreparable injury and damage to such property rights.

1. **The appellant has a property right in its trade name and insignia in California.**

Section 14400 of the Business and Professions Code provides as follows:

“Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner.” (Added by Stats. 1941, Chap. 59, Sec. 1, p. 709).

And Section 14402 of the same Code provides that

“Any court of competent jurisdiction may restrain, by injunction, any use of trade names in violation of the rights defined in this chapter.” (Added by Stats. 1941, Chap. 59, Sec. 1, p. 710).

These statutes were formerly embodied in the Political Code as Section 3199 thereof; and in substance, they have been in effect since 1863. See *Derringer v. Plate*, supra.

In California, a trade name may be transferred in the same manner as personal property in connection with the good will of a business, and the “owner” is entitled to protection by suits at law or in equity. See Section 14401, Bus. & Prof. Code. It may be noted, further, that under the Civil Code, Section 655, “There may be ownership of * * * the good will of a business, trade-marks and signs, and of rights created or granted by statute.”

In accordance with these statutes, the California courts have repeatedly held that there may be “ownership” of a trade name or insignia, and that the right to use such trade designations is a “property” right.

See, for example, *Derringer v. Plate*, supra, at p. 295; *Evans v. Shockley*, supra, at p. 431; *Hainque v. Cyclops Iron Works*, supra note 7, at p. 352; *Hall v. Holstrom*, supra, at pp. 568-569; *Carolina Pines, Inc. v. Catalina Pines*, supra, at pp. 87, 89; *Jackman v. Mau*, supra, at p. 263; *Ward-Chandler Bldg. Co. v. Caldwell* (1935), 8 C. A. (2d) 375, 377; *Reid v. St. John* (1924), 68 C. A. 348, 356; *Wood v. Lazar* (1863), 21 C. 448, 451; *Eastern-Columbia, Inc. v. Waldman*, supra. In the latter case, which appears to be the latest expression of the California Supreme Court on the subject, the court observed that the plaintiff "owns the trade name" (p. 271) and had "acquired property rights and good will therein" (p. 270).

It is equally clear from the California cases that, in accordance with Section 14400 of the Business and Professions Code, supra, such ownership or property right in a trade name or insignia may exist whether the designation is first adopted and used "within or beyond the limits of this State". As said in *Derringer v. Plate*, supra, at p. 295, "The manufacturer at Philadelphia who has adopted and used a trademark, has the same right of property in it at New York or San Francisco that he has at his place of manufacture." See also, *Hall v. Holstrom*, supra, at p. 569.

2. The appellees' use of the appellant's trade name and insignia causes irreparable damage.

Inasmuch as the appellant has a property right in its trade name and insignia, in California, it follows that the appellant is entitled to enjoin any unprivi-

leged use of such trade designations which causes or threatens to cause injury or damage to its property.

By the term "unprivileged use" we mean any commercial use of the word "stork", or the insignia of a stork, other than in its generic or dictionary meaning. In addition, it may be conceded for the purpose of this case that the appellant would have no right to prevent the use of the word, or the picture, in its common suggestive sense—as applied, for example, to diapers or teething rings. We do contend, however, that any commercial use of the word "stork", and its related insignia, in a "secondary" sense is unprivileged as to this appellant, and that any such use which causes or threatens to cause injury or damage to the appellant's property right may be enjoined.

The authorities have come to recognize that in modern society the primary purpose of a trade name or mark is often its advertising function. As *Callman* says, at p. 805, "Advertisement is the function of the trade-mark that requires and illustrates its independence as an economic value and a subject of legal protection." And any unauthorized use of a distinctive trade designation tends to weaken its advertising appeal and thereby to destroy its economic value.

It is said in *Philadelphia Storage Battery Co. v. Mindlin*, supra, at p. 179, a trade name or mark

"* * * is more than a symbol of existing good will or a mere commercial signature; it has a creative function; it serves as a 'silent salesman' to attract custom. The dilution of its selling powers and 'the whittling away of its uniqueness'

by use on noncompeting products constitutes a real injury for which there should be redress. Schechter, *Rational Basis of Trademark Protection*, 40 *Harvard Law Review*, 813; Fog and Fiction in *Trademark Protection*, 36 *Columbia Law Review*, 60."

Likewise, in *Arrow Distilleries v. Globe Brewing Company*, supra, the court observed that (p. 351):

"* * * the rule that coined or fanciful marks or names should be given a much broader degree of protection than words in common use is sound, for it recognizes not only the orthodox basis of the law of trade-marks that the sale of the goods of one manufacturer or vendor as those of another should be prevented, *but also the fact that in modern business the trade-mark performs the added function of an advertising device, whose value may be injured or destroyed unless protected by the courts.* Schechter, *The Rational Basis of Trade Mark Protection*, 40 *Harvard Law Review* 813; *Restatement of Torts*, sec. 715(b)."

In *Bulova Watch Company v. Stolzberg*, supra, the court said (pp. 546-547):

"Gradually, however, the cases have come to recognize that it is the 'unfairness' of the defendant's conduct rather than the existence of 'competition' between plaintiff and defendant which forms the basis for the intervention of a court of equity. The trade-mark not only serves to designate the source of the owner's products, but also stands as a symbol of his good will and hence is an instrument for the creation and retention of custom. Schechter, F. I., *The Rational Basis of*

Trade-Mark Protection, 40 Harvard Law Review, 813. Where the mark is strong, i.e., unique or fanciful, the courts have been more prone to grant protection from use on noncompeting goods.”

* * * * *

“Whatever the distinctions on which the decisions are rested, running through them all is a basic notion of ‘unfairness’. Where the plaintiff has a fanciful or strong mark, built by long use and much expense, he has a substantial interest in his good will. A use by the defendant, even on non-competing goods, may result in injury to the plaintiff’s reputation and dilute the quality of the trade-mark. If the relationship in the products is not too remote under the Waterman rule protection should be given.”

In *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.* (1941), 5 Cir., 123 F. (2d) 582, cert. den. 315 U.S. 824, 62 S. Ct. 917, 86 L. Ed. 1220, the court, after pointing out that the defendant’s activities would necessarily result in depriving the plaintiff of some business, went on to say (p. 584):

“But more significant and important than the fact that this is so, is the purpose evidenced by the choice, by this new comer into the field of automobile financing, of name and advertising matter. This purpose is to project itself into that business arena panoplied in a name already favorably known, rather than to come into it on its own merits, and slowly building, here a little, there a little, establish its own place. * * * Cases in point here are: [Citing cases]. These cases all hold that where as here it plainly appears that there is a purpose to reap where one has not

sown, to gather where one has not planted, to build upon the work and reputation of another, the use of the advertising or trade name or distinguishing mark of another, is in its nature, fraudulent and will be enjoined.”

In *Acme Chemical Co. v. Dobkin*, supra, the court held that there was a likelihood of confusion, and added that (p. 614):

“* * * It also appears to me there is a purpose to reap where one has not sown, to gather where one has not planted, to build upon the work and reputation of another, the use of the advertising or trade-name of the plaintiff and, under such circumstances, it is the duty of the court to grant injunctive relief. *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.*, 5 Cir., 123 F. 2d 582.”

Similarly, in *Lady Esther v. Lady Esther Corset Shoppe*, supra, the court recognized that unless injunctive relief were granted “the good-will of plaintiff, which it has built up at great expense over a period of years, would be whittled away” (p. 11). And in *Cleo Syrup Corp. v. Coca-Cola Co.*, supra, the court granted an injunction to prevent the plaintiff’s good will from being “nibbled away” (p. 417).

In the words of a leading authority on this subject, the “real injury” in cases involving non-competing goods or businesses “is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods. The more distinctive or unique the mark, the deeper is its impress upon the public con-

sciousness, and the greater its need for protection against vitiation or dissociation from the particular product in connection with which it has been used." *Schechter, The Rational Basis of Trademark Protection*, 40 Harv. L. Rev. 813, 825.

Another authority has gone so far as to suggest that in cases, such as the present one, where the danger of dilution exists the court "should not embark upon an obviously irrelevant inquiry into the possibility of confusion. Any use of such famous marks as 'Aunt Jemima' and 'Budweiser' or 'A. & P.' in connection with any product other than the original should be enjoined irrespective of whether there is any similarity between the goods". *Callman*, *supra*, at pp. 1342-1343.

The California courts, also, have recognized that the "benefits of an exclusive trademark are to create and preserve a favorable reputation, to stimulate the sale of a product, and to distinguish it from similar competing products" (*Sun-Maid Raisin Growers v. Mosesian*, *supra*, at p. 494, emphasis ours). See also *Hall v. Holstrom*, *supra*, at p. 596. And while most of the California cases deal with personal names, geographical names, and other designations which are relatively "weak", in at least one case, namely, *Hall v. Holstrom*, *supra*, involving a "strong" designation, "The White Spot" as applied to a restaurant, the court granted injunctive relief upon the theory that the plaintiff had an exclusive property right in such name and that the use of a similar name by the defendant resulted in damage to the plaintiff's

“standing and reputation” and to the “marketability of the plaintiff’s business” (p. 571). While that case involved a registered trademark, the California courts have pointed out that the “registration of a trademark, like the recording of any other instrument, is merely *prima facie* evidence of its validity and ownership”. *Sun-Maid Raisin Growers v. Mosesian*, supra, at p. 494.

It is apparent from the evidence in this case that the appellees’ use of the appellant’s distinctive trade name and insignia necessarily impairs their significance and value as advertising devices, particularly since the appellees appropriated such trade designations, as we have already shown, for the sole purpose of “riding the coattails” of the appellant’s good will and reputation. Unless injunctive relief is granted to preserve the identity and singularity of its valuable trade symbols, the appellant may one day find itself literally “hemmed in” by “Stork Clubs”, and as a result, the value of its trade designations, and its great investment in them, may largely be destroyed.

There is no “commercial necessity” (*Eastern-Columbia, Inc. v. Waldman*, supra, at p. 272) for the appellees to use the word “stork” or its picturization in connection with their business. By acts of calculated piracy they have appropriated the appellant’s property, and such conduct has caused and threatens to cause irreparable injury and damage to the appellant and to its valuable trade designations. The appellant, therefore, is entitled to an injunction upon this ground, as well as upon the theory of confusion.

IV. INJUNCTIVE RELIEF IS NOT BARRED BY LACHES.

1. Laches is not a defense to a suit for injunction.

The answer in this case did not allege, the record does not show, and the court did not find that the appellant has abandoned its right to the exclusive use of its trade designations in California, or that the appellant is estopped from asserting such right as against the appellees. The sole issue is whether, by mere delay, the appellant has lost its right to an injunction.

While laches may preclude recovery of *damages* for unfair competition or infringement, such a defense is not available in a suit for injunction to prevent a continuing wrong. This rule is so well established as to require no more than a citation of authorities. *Brooks Bros. v. Brooks Clothing of California*, supra, at p. 458, and cases cited; *Phillips v. The Governor & Co.*, supra, at p. 974; *Hall v. Holstrom*, supra, at p. 570; *Tomsky v. Clark* (1925), 73 C. A. 412, 420; *Schmidt v. Brieg* (1893), 100 C. 672, 681.

2. The appellant was not guilty of laches.

Despite the settled law on the subject, the trial court found that "the said plaintiff has been guilty of laches and delay in taking no action of any kind or character whatsoever against said defendants or the predecessor in interest of said defendants for the period of three (3) years from the first use of said name in said premises" (Tr. 43).

The salient facts are that the name "Stork Club" has been used in reference to the San Francisco es-

establishment since March 1, 1943, on which date the appellees' predecessor applied to the State Board of Equalization for licenses authorizing the sale of beer, wine and distilled spirits under the name "Stork Club" (Tr. 278-279); that prior to such application, the business was conducted under the name "Elbow Room" (Tr. 279); that the business was purchased by the appellees on April 6, 1945 (Tr. 232); that on May 4, 1945 and again on May 15, 1945, the appellant, acting through its attorneys, sent letters to the appellees advising them as to the appellant's prior rights in the name "The Stork Club" and related insignia, and demanding that they discontinue their use of such name and insignia (Tr. 222-224; 226-227, 283); and that the complaint was filed on February 25, 1946. Aside from the above mentioned letters, the record does not show when the appellant first had knowledge that its trade name and insignia were being used by the San Francisco establishment.

It thus appears that at the time the appellant sent the letters to the appellees demanding that they cease using its trade designations, only about two years had elapsed since such designations were first used in reference to the San Francisco establishment, and that such letters were sent to the appellees about *one month* after they acquired the business. The suit was filed within ten months after the letters were mailed. And so far as the record shows, the appellant did not know about the appellees' use of its trade designations until on or about the dates of such letters.

Under the circumstances, and even assuming that the defense of laches is available, it seems too clear to require further argument that the appellant was not guilty of laches and that the trial court's finding in this respect is clearly erroneous.

In addition to the finding of laches, the trial court found that the appellant "has not caused a demand to be made upon said defendants that said defendants desist and discontinue the use of the said trade mark 'Stork Club'" (Tr. 40), and that the appellant "has not heretofore caused a demand to be made upon said defendants that said defendants desist or continue the use of said trade name, 'Stork Club' or the aforesaid related insignia" (Tr. 43).

The making of such a demand is not, of course, a condition precedent to the filing of suit or to the appellant's right to injunctive relief, and the above findings might therefore be dismissed upon the ground they are of no consequence. However, since they are somewhat related to the issue of laches, we cannot pass them by without pointing out that they are clearly erroneous.

As we have already indicated, the appellant introduced into evidence two letters which were prepared by its attorneys and duly mailed to the appellees advising them as to the appellant's prior rights in the name "The Stork Club" and related insignia, and demanding that they discontinue their use of such name and insignia. The first of these letters, dated May 4, 1945, was addressed to the "Stork Club, 200

Hyde Street, San Francisco, California"; and the second, dated May 15, 1945, was addressed to the "Stork Club, 200 Hyde Street, San Francisco, California, Attention N. Sahati, Zafer Sahati, Sally Sahati, Edmond Sahati, Alfred Ansara and A. E. Syufy partners". These letters were admitted as Plaintiff's Exhibits 68 and 69, respectively (Tr. 222-224, 226-227, 283).

The witness Nicholas N. Sahati was permitted to testify, over objection of the appellant's counsel, that the appellees were not in possession of the San Francisco establishment on the dates the letters were mailed (Tr. 264-266). This testimony was received despite the fact that the witness had already testified that the appellees were the actual owners of the establishment on April 6, 1945, and that they had been receiving a percentage of the profits since about March 15, 1945 (Tr. 232). In addition, the record shows that the liquor license, and the beer and wine license, were transferred to the appellees on April 6, 1945 (Tr. 278); that a sales tax permit was issued to the appellees as of March 16, 1945 (Tr. 282); and that the appellees actually paid the sales tax after April 11, 1945 (Tr. 282).

Moreover, in their verified answer to the complaint, which was sworn to by the above mentioned witness, the appellees "admit that on or about April 6, 1945, they became the owners of and ever since have operated and conducted" the San Francisco establishment "under the name of 'Stork Club'" (Tr. 19-20). And

this same witness, in his affidavit in opposition to the appellant's motion for a preliminary injunction, stated that "affiant and the other named defendants purchased said business on April 6, 1945, from the former owner thereof, to-wit: one William Bush, and that affiant and said other defendants have owned and operated said business since said date" (Tr. 13).

Under the above circumstances, the testimony of this witness that the appellees were not in possession on May 4 and May 15, 1945, was patently inadmissible. While Sahati testified, also, that *he* did not receive the letters (Tr. 263-264), there was no evidence that his partners did not receive them. Presumably they did receive them (California Code of Civil Procedure, Sec. 1963 (24)), and notice to one partner is notice to all. *Sweet Sixteen Co. v. Sweet "16" Shop*, supra, at p. 924.

It thus appears that the testimony of Sahati that the appellees were not in possession of their business on the dates the demand letters were sent, was clearly inadmissible, and that even if admitted and believed, such testimony would not support a finding that the other appellees did not receive such letters. Hence the trial court's findings that the appellant made "no demand" are clearly erroneous, as is the finding that the appellant was guilty of laches.

V. CONCLUSION.

For the foregoing reasons the judgment of the trial court should be reversed with directions to grant the appellant an injunction as prayed for in the complaint.

Dated, San Francisco,
August 30, 1947.

Respectfully submitted,
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Attorneys for Appellant.

No. 11,657

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STORK RESTAURANT, INC. (a corporation),
Appellant,

vs.

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EDMOND SAHATI, ALFRED ANSARA, A. E.
SYUFY,
Appellees.

BRIEF FOR APPELLEES.

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SYUFY,
Appellees.

BRIEF FOR APPELLEES.

FACTS.

The facts of the instant case as given in the brief for appellant are substantially correct for the purpose of this appeal and appellees respectfully call attention to appellant's statement of the vastness of its operation of the Stork Club in the City of New York in comparison with the smallness of appellees' "Stork Club" in the City and County of San Francisco.

The question in this appeal lies in the use of a trade name, to-wit, "Stork Club", by both parties to the action and in the use of an insignia claimed by the appellant. There is not involved in this appeal any question of a registered trade mark.

Appellees have no quarrel with the general rules relative to trade names and trade insignia used in business and as set forth in the cases cited by appellant. However, appellees rest their entire argument upon the particular facts of the case before this Court.

I.

APPELLANT HAS FAILED TO SHOW THAT APPELLEES ARE GUILTY OF UNFAIR COMPETITION OR ANY COMPETITION WITH APPELLANT.

From all the evidence in this case and from the statements set forth in appellant's brief it is clearly shown that appellant operates a night club and cafe that is very extensive in its operation; that appellees operate a small bar some 3000 miles away from appellant's place of business; that appellant employs some 240 employees in the operation of its business; that appellees employ 4 employees; that appellant operates a night club catering to world celebrities from political, social and entertainment fields and sells high price and high quality foods, beverages and entertainment; that appellees have just an ordinary bar and restaurant serving a minimum of food to meet the requirements of the Liquor Control Authorities of the State of California.

From the very facts as adduced from the evidence and as succinctly restated in appellant's brief the two places are at extreme poles from each other. The

appellant's place is of the highest, and the appellees', to say the least, is very modest in its operation.

Can it be truthfully stated from the evidence presented that appellees are in "unfair competition" or in any competition whatsoever with appellant? Appellant has failed to show by any of its evidence that by appellees' operation appellant has lost custom or prestige so that appellees' operation in any way has injured appellant. Some showing has been made that appellant draws customers from certain residents of San Francisco and of the vicinity of San Francisco. However, there was no evidence that by reason of appellees' operation of a "Stork Club" in San Francisco those customers of appellant in this vicinity were fooled or misled into belief that the establishment here had any connection in any way with the world famous Stork Club of New York City.

Appellant cited *Brass Rail, Inc. v. The Brass Rail of Massachusetts, Inc.*, 43 F. Supp. 671, in which case the Court held that the plaintiff, of New York City, could enjoin the defendant in Boston from using the name "Brass Rail". An examination of this case shows that defendant copied plaintiff's exact method of operation, and did so with an absolute intention of obtaining the benefits of the reputation of plaintiff. The distinguishing fact in that case was "the striking similarity of the physical set up of defendant's places of business and that of the plaintiff", which lead the Court to conclude that the defendant sought to imitate the plaintiff in all respects. It is

respectfully submitted that the facts in the instant case are entirely different, if for no other reason than from the purely physical status and operation of the two places of business herein involved.

It is also interesting to note that in another *Brass Rail* case involving apparently the same Brass Rail as the plaintiff in the case quoted above, the Court held that the defendant in that case was not in unfair competition with the plaintiff even though the names were the same. The facts in the last case show that plaintiff occupied a four story building with large dining rooms and an investment of some \$750,000.00 and employed approximately 275 persons serving customers with expensive foods cooked on the premises. Defendant opened a 5 and 10 cent sandwich and soft drink restaurant in Pittsburgh which grew as time went on until at the time of the suit defendant owned 10 such restaurants. The Court held "There is no evidence from which we can find that defendant adopted the name with the view to injuring the business of the plaintiff and to take advantage of the reputation of the plaintiff's restaurant." (*The Brass Rail, Inc. v. Brass Rail Restaurant Co.*, U. S. Dist. Court, West. Dist. of Pa. June 2, 1938, 28 Trade-Mark Reporter 408, 38 Pat. Q. 58.)

Likewise in this case appellant has not shown that appellees adopted the name Stork Club with the intention of trading upon or obtaining the advantages of the reputation of appellant's restaurant or in any way to forestall the extension of appellant's trade

or for any other purpose. In fact the evidence showed that appellees purchased the said business sometime after it had been known and called by the previous owners the "Stork Club."

Southern California Enterprise, Inc. v. Broadway Ballroom, Inc., 64 N. Y. S. (2d) 613, is a case involving the use by the defendant in New York City of the word "Palladium" for a dance hall. Plaintiff had previously adopted said name for its huge ballroom large enough to accommodate 9,000 persons in Hollywood, California, and sought to restrain defendant from using the same name for its dance hall in New York. The Court refused to grant such an injunction on the ground that the two establishments were entirely different even though they were both ballrooms. The Court stated that plaintiff maintained a magnificent establishment whereas defendant's ballroom was an unpretentious dance hall. The same analysis and distinguishment can be made between the appellant Stork Club and the appellee Stork Club.

II.

APPELLANT IS NOT ENTITLED TO AN INJUNCTION UPON THE THEORY THAT IT HAS BEEN DAMAGED IN A PROPERTY RIGHT.

It must be remembered that this case is one involving a trade name and not a trade mark duly registered. While it is true that there is some evidence that appellees used the depiction of a stork on the carpet in

its entrance and a stork on the napkins and a stork upon the juke box, none of these storks were similar or identical to the stork claimed by the appellant. It must also be remembered that the alleged trade name in and of itself "Stork Club" means nothing unless appellant can show that that name has become synonymous with its particular business and that it is so well known that the use by any one else would deprive appellant of its business or custom or injure appellant in some way.

The evidence clearly shows that appellant operates its business solely in New York City and in no other locality in the United States and that it has no intention of opening any branches in any other part of the United States.

How, then, has appellant been injured by the use of the name "Stork Club" by appellees?

Appellant is not a merchant in the true sense as it does not sell any product but merely sells services in its restaurant together with entertainment. Appellant does not have a product which is sold in interstate commerce or in any commerce whatsoever, but in contrast, to purchase what appellant has for sale the prospective purchaser must travel to the City of New York in order to become a customer of appellant. It may be true that appellant has customers and a clientele from the City and County of San Francisco and from the vicinity of said City and County of San Francisco. However, said customers must travel 3,000 miles in order to enjoy the fruits of their purchases from appellant.

Appellant has stated that the use of the alleged trade name by the appellees will cause irreparable damage to appellant but has failed to introduce any evidence whatsoever to show such irreparable damage. The cases cited by appellant under this heading are all cases involving the actual sale and transfer of some product or products manufactured and sold by the parties to those suits and some of said cases involve the use by the defendants of trade marks registered by the plaintiffs. Neither of these two situations appears in the instant case and it is respectfully submitted that appellant has failed in any way to show any irreparable damage by appellees' use of said name.

III.

CASES IN THE NINTH CIRCUIT HAVE DECIDED THE SAME POINTS HEREIN INVOLVED IN FAVOR OF APPELLEES.

Appellant has cited innumerable cases, all of which can easily be distinguished from the facts in the instant case. Appellees feel that it is not necessary to distinguish each case cited by appellant in view of the recent consideration by the Court of such cases in this jurisdiction as *Brooks Bros. v. Brooks Clothing of California, Ltd.*, 158 F. (2d) 798, and *Lerner Stores Corporation v. Lerner*, 162 F. (2d) 160, in which cases this Court has reviewed and distinguished most of the cases cited by appellant in its opening brief. However, it can be said that most of the cases cited by appellant involve unauthorized use of duly and properly registered trade marks, or the unfair competition

of the defendants in the same locality served by the plaintiffs, or the competition of the defendants with a product similar to that of the plaintiffs coupled with a confusingly similar trade name or trade mark, which trade name and trade mark were adopted in order to obtain the benefits of the reputation of the name of the plaintiff.

In the instant case it can be said that the cases cited by appellant do not apply because of the difference in facts and the peculiar difference of the two businesses herein involved, to-wit:

1. Appellant operates a large establishment and appellees a very small one.

2. Appellant does not do business in the City and County of San Francisco in any manner or form.

3. Appellees do not in any way compete with appellant.

4. Neither party sells or manufactures goods in commerce.

5. The great distance between the two places of business.

In *Brooks Bros. v. Brooks Clothing of California, Ltd.*, supra, the Court reviewed the humble beginnings of the defendant and the original operation of defendant's business as a small, low-priced clothing business, and then went on to say "and had the defendant remained in the humble field in which it began and had it used its full partnership or corporate name its innocent adoption might, perhaps, call for denial of relief for unfair competition."

Here it can be truthfully stated that appellees, in comparison to appellant, are in a most humble field of operation. Their establishment is small in comparison to that of appellant; its volume of business is minute in comparison to appellant's; it employs 4 workers in comparison to appellant's 240. Being humble in comparison to appellant this Court can very well deny any relief for unfair competition with appellant.

Lerner Stores Corporation v. Lerner, supra, involves a set of facts very similar to those in the instant case and in that case relief was denied to the plaintiff. The facts in the *Lerner* case disclose that plaintiff operates a store in San Francisco which draws some trade from customers in San Jose and that defendant operates a store in San Jose under the name of Lerner. It is interesting to note that the distance between San Francisco and San Jose is some 50 miles and that the distance between San Francisco and New York is some 3000 miles. This Court refused to grant an injunction in the *Lerner* case on the ground that no ordinary observant person would confuse defendant's store with the plaintiff's stores even though it could be stated that plaintiff had stores in San Francisco and in Oakland, planned to have a store in San Jose and also in other communities in the Bay Area such as in Palo Alto, San Mateo and Burlingame.

CONCLUSION.

It is respectfully submitted that appellant failed to establish the necessary prerequisites to obtain an injunction, to-wit: appellant has failed to show in any way that the appellees have engaged in a practice which can be construed to be unfair competition, and that appellant was damaged to any extent in their alleged property rights in and to the name Stork Club, and, therefore, appellees respectfully pray that the judgment of the trial Court be affirmed.

Dated, San Francisco,
October 2, 1947.

Respectfully submitted,
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Of Counsel.

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Appellees.

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No. 11,657

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

STORK RESTAURANT, INC. (a corporation),
Appellant,

vs.

N. SAHATI, ZAFER SAHATI, SALLY SAHATI,
EDMOND SAHATI, ALFRED ANSARA, A.
E. SYUFY,
Appellees.

REPLY BRIEF FOR APPELLANT.

The appellees do not question the summary of evidence as set forth in the appellant's opening brief. And while they profess to have no quarrel with the applicable rules of law and cases presented in the appellant's brief, it is apparent that their argument is in many respects incompatible with the authorities reviewed in the Brief for Appellant.

In answering the appellees' brief, the appellant will deal specifically with each topic as stated therein.

“I.

“APPELLANT HAS FAILED TO SHOW THAT APPELLEES ARE GUILTY OF UNFAIR COMPETITION OR ANY COMPETITION WITH APPELLANT.”

Under this topic the appellees point out that the appellant introduced no evidence to show that particular persons were actually misled into believing that there was some relation between the appellees' business and that of the appellant, or to show that the appellant sustained a monetary loss.

In a suit for injunction it is not necessary to prove specific instances of confusion; it is sufficient to show—and the evidence does show, as demonstrated in the appellant's opening brief—that there is a *likelihood* of confusion. *Rest., Torts*, vol. 3, sec. 728, p. 591; *Callman, Unfair Competition and Trade Marks*, vol. 2, p. 1124; *Brooks Bros. v. Brooks Clothing of California* (1945), 60 F. Supp. 442, 450, 453, 454, 459, 158 F. (2d) 798; *Law v. Crist* (1940), 41 C.A. (2d) 862, 865-866; *Hoover Co. v. Groger* (1936), 12 C.A. (2d) 417, 419; *Sun-Maid Raisin Growers v. Mosesian* (1927), 84 C.A. 485, 497; *Schwarz v. Schwarz* (1928), 93 C.A. 252, 255; *Winfield v. Charles*, decided November 29, 1946, 77 A.C.A. 80, 85.

Nor is it necessary in a suit for injunction to prove that actual damage has occurred; it is enough to show that injury or damage is threatened or imminent. *Brooks Bros. v. Brooks Clothing of California*, supra, at p. 459; *Law v. Crist*, supra, at pp. 865-866; *Hall v. Holstrom* (1930), 106 C.A. 563, 572; *Sun-Maid Raisin Growers v. Mosesian*, supra, at p. 497; *Winfield v. Charles*, supra, at p. 85.

As the Court said in *Winfield v. Charles*, supra (at p. 85) :

“It is unnecessary, in such an action, to show that any person has been confused or deceived. It is the likelihood of deception which the remedy may be invoked to prevent. (*Schwarz v. Schwarz*, 93 Cal. App. 252, 255 (269 P. 755).) ‘It is sufficient if injury to the plaintiff’s business is threatened, or imminent to authorize the court to intervene to prevent its occurrence.’ (*Sun-Maid Raisin Growers v. Mosesian*, 84 Cal. App. 485, 497 (258 P. 630).) * * *”

Moreover, it is to be noted that in the *Brooks Bros.* case there was no testimony that particular persons had been deceived. The Court held that the nationwide reputation which the plaintiff had established “has created a condition where, to use the language of the Restatement of Torts, ‘confusion of source’ is *inherent* in the use of the word ‘Brooks’ by anyone but the plaintiff” (p. 453, emphasis ours).

Nor was there any proof in the *Brooks Bros.* case that the plaintiff had sustained any monetary loss. As the Court said, “The plaintiff has offered no proof of actual loss or injury. * * * The proof in the record here would lead to the conclusion that the plaintiff suffered no injury in its business and that the profits, if any, were due to the aggressive merchandising methods and the business acumen of the defendant” (p. 459). The Court held, accordingly, that the plaintiff was not entitled to damages; but it nevertheless issued an injunction. As said in *Adolph Kastor Bros. v. Federal Trade Commission* (1943), 2 Cir., 138 F.

(2d) 824, 826 (quoted in *Brooks Bros.* case, *supra*, at p. 460, footnote 42), "No one need expose his reputation to the trade practices of another, even though he show no pecuniary loss * * * [citing numerous cases]."

Neither of the two cases cited by the appellees under the present topic lends any support to their argument. In the first such case, *The Brass Rail Inc. v. Brass Rail Restaurant Co.* (1938), D.C., W.D.Pa., 38 U.S.P.Q. 58, the name "Brass Rail", as the court said, "was selected by the defendant in good faith, with no knowledge of its prior use in New York City by plaintiff" (p. 59). The court observed, further, that there was no evidence "from which we can find that the defendant selected the name 'Brass Rail' with any design inimical to the interests of the plaintiff, either to take the benefit of the reputation of plaintiff's restaurant, to forestall the extension of plaintiff's trade, or for any other sinister purpose" (p. 59). The court then stated that its view was supported by the *Rectanus* and *Hanover* cases (see appellant's opening brief, p. 73 ff.). It thus appears that the *Brass Rail* case falls within the same category as the latter two cases and does not aid the appellees here.

The other case relied upon by the appellees, *Southern California Enterprises, Inc. v. Broadway Ballroom, Inc.* (1946), 64 N.Y.S. (2d) 613, is likewise readily distinguishable. There the plaintiff's name "Palladium" was specifically found by the court not to have acquired a secondary meaning (pp. 614, 615), and the court further observed that "there is

evidence that 'Palladium' is the name of a famous music hall in London, England, and that that name has been used, and is being used, in this State and elsewhere by amusement companies and other business enterprises, and that it was so used before the plaintiff decided to employ that name for its establishment in Hollywood" (p. 614).

Moreover, the court recognized the soundness of the *Maison Prunier* case (see appellant's opening brief, pp. 81-82), and remarked that a "different question might perhaps arise, if, as in the *Prunier* case, the defendants had also appropriated the plaintiff's trade mark or its advertising slogan for the purpose of conveying the impression that the New York establishment was identical with, or a branch of, the plaintiff's ballroom in Hollywood" (p. 616). In the present case, of course, the appellees appropriated not only the appellant's trade name but also its trade insignia, and they did so for the purpose of trading upon the appellant's good will and reputation. This case, therefore, falls within the rule of the *Maison Prunier* case, and is not comparable with the case relied upon by the appellees.

"II.

"APPELLANT IS NOT ENTITLED TO AN INJUNCTION UPON THE THEORY THAT IT HAS BEEN DAMAGED IN A PROPERTY RIGHT."

The appellees do not dispute the proposition that the appellant has a property right in its trade name

and insignia in California. They contend merely that the appellant has failed to show irreparable damage resulting from the use of such trade designations by the appellees.

As indicated above, it was not necessary for the appellant to prove actual damage. And the threat or imminence of irreparable damage to the appellant's property rights is fully established in its opening brief at pages 99-105, where it is shown that the appellees' use of the appellant's highly distinctive trade name and insignia necessarily impairs their value as advertising devices, and that unless injunctive relief is granted to protect and preserve the identity and singularity of these valuable trade symbols, their advertising value, and the appellant's great investment in them, may largely be destroyed.

As forcefully and realistically expressed by Judge Bard in *Stork Restaurant, Inc. v. Marcus* (1941), D.C., E.D. Pa., 36 F. Supp. 90, 94, "upon the strength of a single, if sustained, precedent the plaintiff could be literally 'hemmed in' by 'Stork Clubs', until the public was so surfeited with the same that the mere mention of the name would provoke contrary reactions."

Appellees call attention to the fact that the appellant's business establishment is located in New York City; that appellant "does not have a product which is sold in inter-state commerce or in any commerce whatsoever" (p. 6); and that the present case does not involve a registered trade mark. All such matters

have been recognized and dealt with extensively in the appellant's opening brief. As we have shown, they do not preclude the granting of injunctive relief. If they do, we have been favored with no authorities to that effect.

“III.

“CASES IN THE NINTH CIRCUIT HAVE DECIDED THE SAME POINTS HEREIN INVOLVED IN FAVOR OF APPELLEES.”

The appellees rely upon the *Brooks Bros.* case, supra, and the recent case of *Lerner Stores Corporation v. Lerner* (1947), 9 Cir., 162 F. (2d) 160. The *Brooks Bros.* case has already been discussed. See, also, appellant's opening brief, at pp. 75-76.

The *Lerner* case is clearly distinguishable from the present one upon several grounds. In the first place, it involved the use by the defendant of his own surname. “In such cases the defendant has good reason to use the name and an absolute injunction may not be necessary to afford the plaintiff adequate protection. Appropriate relief may therefore be given by an injunction which permits the defendant to continue the use of the name but requires him to take precaution against deception of prospective purchasers by accompanying the name with a distinguishing legend or by other appropriate means.” *Rest., Torts*, vol. 3, p. 636.

In the *Lerner* case, the defendant had already taken all possible precautions to obviate confusion. Upon

notice from the plaintiff protesting his use of the name "Lerner's", he "immediately set about making additions to the name so as to avoid confusion in the minds of the customers" (162 F. (2d) 161). He dropped the "'s'" from the name "Lerner's", added his given name "Wilfred", and added also the words "Home Owned". Furthermore, as this Court observed, he "used a continuous script type for his advertising and store front modeled on his own handwriting, which style of lettering differed in every material respect from the arrangement, lettering and text of appellant's store front * * *" (p. 162).

In contrast, the present case involves a trade name and insignia which are extremely arbitrary, fanciful, and unique, and which are therefore entitled to the highest degree of protection. (See Brief for Appellants, p. 40 ff.) Furthermore, the appellees used both the name "Stork Club" and the stork insignia—although there was no commercial necessity for them to use either designation—and they used them for the purpose of "riding the coattails" of the appellant's good will and reputation.

It is to be noted, also, that in the *Lerner* case the plaintiff did not advertise in newspapers, magazines, or over the radio (p. 161), and that its merchandising methods were not designed to draw patronage from large areas to its stores in San Francisco and Oakland. On the contrary, its plan of operation was to establish stores in each community to be served. In the present case, the appellant has spent hundreds of

thousands of dollars in advertising which is expressly designed to develop, and which has successfully created, a nation-wide patronage area.

In the *Lerner* case, finally, the plaintiff, as this Court pointed out, "moved into a territory where another firm using the name of 'Lerner' was established. The 'J. S. Lerner-Vogue', with its home office in Kansas City and doing business in a number of other states, was first in the field" (p. 163). Here, it is not disputed that the appellant was first in the field, and that its trade name and insignia had become widely known throughout California long before they were pirated by the appellees.

The appellees seek to distinguish the authorities cited in the appellant's opening brief upon the following grounds:

"1. Appellant operates a large establishment and appellees a very small one." (Difference in size is not the controlling factor. See Brief for Appellant, p. 68 ff.)

"2. Appellant does not do business in the City and County of San Francisco in any manner or form". (This is true only in the sense that appellant has no *place* of business in San Francisco. But the *situs* of the business is not the dispositive factor. See Brief for Appellant, p. 71, ff.)

"3. Appellees do not in any way compete with appellant." (Competition is not necessary. See Brief for Appellant, p. 53, ff.)

“4. Neither party sells or manufactures goods in commerce.” (This, of course, does not foreclose injunctive relief. See Brief for Appellant, p. 53 ff.)

“5. The great distance between the two places of business”. (“Distance is no defense”. See Brief for Appellant, p. 71 ff.)

As Judge Learned Hand observed in the *Kastor* case, supra, “The Kastor Company is in a dilemma; either its knives will sell as well under some other name, or the name, ‘Scout’, gives them an advantage to the prejudice of the Boy Scouts” (p. 826).

The appellees here are in the same dilemma.

Dated, San Francisco,

October 14, 1947.

Respectfully submitted,

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